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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AXEL-FELIX KLEIBOEMER, *et al.*,
Petitioners,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether members of a prevailing duly certified class action were denied due process by the refusal of the trial court to order refunds of $1.8 million of illegally collected tax money to 2,711 class members?

2. Whether the *American Pipe* doctrine requires that the period for filing administrative claims for tax refunds established by District of Columbia law be tolled where the trial court upheld the tax and bound all members of the class to that judgment and where the tax is later held to be *ultra vires*?

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THE DISTRICT OF COLUMBIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner Axel-Felix Kleiboemer respectfully petitions for a writ of certiorari on behalf of the class to review the judgment of the District of Columbia Court of Appeals, entered on September 7, 1983, upholding the decision of the trial court denying the refund of $1.8 million of taxes illegally collected by the District of Columbia Government from 2,711 prevailing class members.

OPINIONS AND ORDERS BELOW

The opinion of the District of Columbia Court of Appeals holding the tax in question illegal is reported at 401 A.2d 955. The *en banc* opinion affirming the decision of the division is reported at 411 A.2d 997. The opinion of the District of Columbia Court of Appeals ruling that the respondent is not required to refund all of the tax illegally collected is reported at 458 A.2d 731 and ap-

pears in the Appendix ("App.") at 1a-12a. The supplemental opinion of the court of appeals denying petitioners' request for rehearing appears at App. 13a-21a.

JURISDICTION

The opinion of the District of Columbia Court of Appeals in this case was issued on March 22, 1983. The supplemental opinion denying petitioners' petition for rehearing was issued on September 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Procedural Background

On October 21, 1975, Section 47-1574 of the District of Columbia Code (Supp. V 1978) became effective. Under the terms of this law the District of Columbia imposed an unincorporated business tax on unincorporated professionals and personal service businesses ("professional tax" or "commuter tax"). Pursuant to Section 47-1589e of the District of Columbia Code, respondent has the power to fine and imprison individuals who willfully refuse to pay this tax.

On March 25, 1976, petitioner Axel-Felix Kleiboemer filed his 1975 District of Columbia Unincorporated Business Tax return and paid the required tax. With his payment, petitioner Kleiboemer filed a claim for refund, contending that the tax was imposed on the "personal income" of nonresidents in violation of Section 602(a)(5) of the Home Rule Act, Section 1-147(a)(5) of the

District of Columbia Code (Supp. II, 1975). On March 26, 1976, the District of Columbia Department of Finance and Revenue denied his claim for refund.

On April 5, 1976, Kleiboemer filed a class petition seeking the refund of "all amounts paid by all taxpayers who are members of the petitioner's class pursuant to the challenged tax . . . ." By motion filed April 30, 1976, Kleiboemer moved the Superior Court for a class determination pursuant to Civil Rule 23(b)(1), as made applicable to proceedings in the Tax Division by Tax Rule 3.

The trial court entered an order dated October 17, 1977,[1] granting petitioner Kleiboemer's motion for class determination:

> FURTHER ORDERED that the class shall consist of all nonresidents who are subject to the tax in question by virtue of engaging in unincorporated personal service businesses in the District of Columbia and who have paid the tax.

Order of October 17, 1977, at 2. (App. at 23a).

The trial judge stated in detail the rationale for certifying the case as a class action under Rule 23(b)(1)(A):[2]

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[1] The order was entered on October 18, 1977. We refer to this order as the October 17, 1977, order to distinguish it from the Order and Opinion signed, dated and entered October 18, 1977, dismissing the petitions for refunds on the merits.

[2] Super. Ct. Civ. Rule 23(b)(1)(A) is identical to federal Rule 23. This rule provides:

> (b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . .

> After reviewing Super. Ct. Civ. R. 23 and the applicable cases, this Court is satisfied that petitioners can maintain this action as a class action under Rule 23(b)(1)(A) and arguably under Rule 23(b)(1)(B). The Court relies only on Rule 23(b)(1)(A). *cf. McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975); *Landau* v. *Chase Manhattan Bank, N.A.*, 367 F. Supp. 1992 (S.D.N.Y. 1973); *Goldman* v. *First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972). Here as distinguished from the above cases, the failure to maintain a class action would impose incompatible standards of conduct on the District of Columbia. This is not a simple action for a money judgment but rather a case which calls into question a tax statute of the District. It is therefore possible that a contrary opinion could impose upon the District incompatible standards of conduct; collecting the tax from some and not from others. Moreover, this Court cannot overlook the impact on the fiscal affairs of the District of Columbia in the event of inconsistent decisions. For these reasons the Court concludes the case is properly brought under Rule 23(b)(1)(A).

(App. at 23a). In a separate order entered on October 18, 1977, the trial judge ruled that the tax was lawful and dismissed the petitions for refunds with prejudice. Each class member was bound by the trial court's order upholding the tax.

Thereafter, on October 27, 1977, the trial judge modified his order of October 18, 1977, by holding that the tax impermissibly discriminated against calendar-year taxpayers in favor of fiscal-year taxpayers and that the calendar-year taxpayers were entitled to a refund of all taxes paid by them *prior* to December 1, 1975. (App. at 24a-25a). The trial court stated that "[a]ny members of the class who were fiscal year taxpayers and had perfected their claim for refund as pro-

vided by law, would now be entitled to a refund or credit consistent with the above [opinion]. . . ." Memorandum Order of October 27, 1977, at 8. In a separate judgment order, also entered on October 27, 1977, the trial court ruled as follows:

> ORDERED that the class consists of those nonresident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, Sec. 47-1574b (Supp. IV, 1977) except for Richard A. Bishop (See Tax Docket No. 2362), and it is further
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> • • •
>
> ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, provided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j.*

* *Cf.: D.C.* v. *Keyes*, 362 A.2d 729 (D.C. App. 1976).

(App. at 24a-25a).

The first paragraph of the October 27, 1977, judgment order recited anew and did not change the class definition contained in the October 17, 1977, certification order. Thus, as of October 27, 1977, the class remained "those nonresident taxpayers who have paid the [tax] except for Richard A. Bishop."

Petitioner Kleiboemer appealed the October 18, 1977, order ruling the tax valid. Respondent appealed the October 27, 1977, order granting an 11-month refund of the tax. The District did not appeal the separate order of October 17, 1977, granting class certification and defining the class as those nonresidents who had paid the tax.[3]

[3] At no time during the briefing and oral argument before the District of Columbia Court of Appeals did the District challenge the class action certification or the October 17, 1977, definition of the class. The court of appeals in its April 20, 1979, opinion expressly recognized the class as consisting of "all nonresident professionals

In December 1978, the District of Columbia mailed a notice to those taxpayers who were continuing to pay the illegal tax, advising them of respondent's view that they were required to file claims for refund for 1975 by April 15, 1979, in the event the tax might be held illegal by a subsequent decision of the court of appeals. The District had a list of taxpayers that included the names and addresses of those individuals who did not receive the December 1978 notice; however, respondent chose not to notify these individuals by mail. As a result, a large number of taxpayers never received actual notice by mail of the purported requirement that they file a claim for refund. However, the trial court held that constitutionally adequate notice had been given to class members regarding the administrative claim requirement. (App. at 26a-28a). Petitioners filed a notice of appeal from this decision.

B. Court of Appeals Decisions

On April 20, 1979, the District of Columbia Court of Appeals unanimously held the tax on nonresident professionals and other nonresident owners of personal service businesses to be *ultra vires* as "an invalid exercise of the city council's legislative authority under the Home Rule Act." *Bishop* v. *District of Columbia*, 401 A.2d 955, 961 (D.C. App. 1979). Sitting *en banc*, the court of appeals affirmed the earlier opinion holding the tax invalid. 411 A.2d 997 (D.C.App.) (*en banc*), *cert. denied*, 446 U.S. 966 (1980). The *en banc* opinion observed that "Congress expressly and specifically withheld the District of Columbia Council's authority to impose a tax on the income of nonresidents." *Id.* 411 A.2d at 999. The trial court's judgment of October 18, 1977, denying petitioners' claims for refund of the tax paid was reversed.

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subject to the tax and who had paid the tax, except for appellant Bishop." *Bishop* v. *District of Columbia*, 401 A.2d at 956 n.5.

C. Post-Appeal Proceedings

On October 22, 1980, the trial court entered a comprehensive judgment order which provided that the "District of Columbia is directed to refund the . . . tax paid by or on behalf of petitioner Axel-Felix Kleiboemer, all members of the class . . ." The October 22 order repeated the definition of the class created by the October 17, 1977 order, that is, "all nonresident professionals . . . who have paid the tax. . . ." The District of Columbia reserved the right to argue that class members, in addition to being members of the class, were required to file individual claims for refunds within three years from the time the tax was paid to obtain the return of the money they paid pursuant to the *ultra vires* tax.[4]

On September 24, 1981, the trial court ruled that "the timely filing of individual claims [for refund under D.C. Code Section 47-1586j] by affected taxpayers is a prerequisite to refunds in this suit." This ruling denied refunds to 2,711 class members and allowed the District of Columbia to retain $1.8 million of tax money that had been illegally collected from unincorporated professionals residing outside of the District of Columbia. (App. at 29a-30a).

D. Second Appeal

The court of appeals upheld the decision of the trial court that technical compliance with Section 47-1586j was a prerequisite for obtaining a refund for the *ultra vires* tax. (App. at 1a-10a, 13a-19a). The court held that the exhaustion of remedies doctrine and the imposition of a requirement of filing individual administrative

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[4] By the time the mandate had returned to the trial court, the three-year period for filing administrative claims for refunds established by Section 47-1586j of the District of Columbia Code had expired. This section provides in pertinent part that:

> No . . . refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer.

claims for refund were legitimate state interests justifying the District's refusal to refund all of the illegally collected tax. (App. at 5a-7a). Although the court had previously declared the tax unlawful, the court concluded that denial of the refunds to class members who did not file apparently futile claims for refunds did not violate due process "because the trial court decision was appealed and subject to reversal." (App. at 20a). The court of appeals also concluded that the doctrine of equitable tolling was not available to the class. (App. at 8a-10a, 18a-19a).

E. Federal Questions Properly Raised

The federal questions raised in this petition were specifically decided by the District of Columbia Court of Appeals. Petitioners argued that the Due Process Clause of the Fifth Amendment of the Constitution required the refund of all of the illegally collected tax money to *all* class members, irrespective of whether they had filed claims for refund during the period in which the tax had been upheld by a decision of the trial court. The court of appeals rejected petitioners' argument that it would be extremely harsh and fundamentally unfair "to deny refunds to some class members." (App. at 7a n.6, 20a). The Court also turned down petitioners' claim that:

> [M]embers of the class, having been bound by the trial court judgment adverse to them until this court reversed it (after the statutory period for claims expired), would be denied due process if they were denied the benefits of this court's final judgment holding the tax illegal.

(App. at 20a.)

The court of appeals also rejected petitioners' alternative argument that timely filing of the class action claim for refund tolled the statute of limitations for filing refunds under this Court's doctrine of equitable tolling as articulated in *American Pipe* and its progeny.

I. This Court should grant review because the Due Process Clause is violated by the District of Columbia's refusal to refund all of the *ultra vires*, unlawfully collected tax money.

The imposition of the professional tax in this case is a *per se* violation of petitioners' right to due process:

> [T]he exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment.

Frick v. *Commonwealth of Pennsylvania*, 268 U.S. 473, 488-489 (1925). Where there is "no power to impose a tax, its exaction is a taking of property without due process of law. . . ." *Lee* v. *Osceola & Little River*, 268 U.S. 643, 646 (1925).

Long ago this Court made clear that a taxing authority is obligated to refund all money where payment of an illegal tax was made under compulsion. *Ward* v. *Board of County Comrs.*, 253 U.S. 17 (1920). In reaching this conclusion, the Court relied on the well-settled rule that money obtained through unlawful means may be recovered, since reaching the contrary result of allowing the taxing authority to retain the funds would be nothing short of saying that it could take or appropriate property of the taxpayer arbitrarily and without due process of law. *Id.* at 24.

In *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), this Court required Oklahoma to refund a tax on Indian property that had been declared exempt from taxation by an Act of Congress; the Court did so despite the state's argument that petitioners were barred from obtaining refunds because they failed to comply with a precondition imposed by state statute requiring initial timely payment of the tax.

This Court stated: "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contradiction of the Fourteenth Amendment." *Id.* at 369. Under *Carpenter* v. *Shaw*, a state court may not deny a tax refund in a lawsuit where class members failed to comply with similar state-imposed administrative requirements for obtaining refunds of an illegally imposed tax on income declared exempt by an Act of Congress. 280 U.S. at 369.

Several years after *Shaw*, this Court affirmed a court of appeals decision upholding the right of the taxpayer to recover payments of certain taxes levied contrary to an express Act of Congress in face of an argument identical to that advanced by respondent—that is, a taxpayer who does not pursue the *exclusive* statutory remedies provided by the state may not recover the taxes paid. *Board of County Comrs.* v. *Seber*, 318 U.S. 705, 719 (1943). The court of appeals held that the right to recover taxes that are illegal and void because they are beyond the jurisdiction of the taxing authority cannot be made to depend upon any state procedural requirements, since the effect of upholding the state's requirement of compliance with its procedural requirements would deny a vested right or immunity granted by a law of the United States. 130 F.2d 663, 671 (10th Cir. 1942).

Just as the Indian lands that were the subject of litigation in *Ward*, *Shaw*, and *Seber* were specifically exempted from taxation by an Act of Congress, so also were the incomes of nonresident professionals exempted by Congress from the commuter tax levied by respondent. Petitioners have been denied their due process rights just as were the prevailing petitioners in *Ward*, *Shaw*, and *Seber*. Accordingly, the judgment of the court of appeals should be reversed.

II. This Court should grant review because application of the District of Columbia refund statute so as to deny benefits of the class action judgment is a denial of due process.

The court of appeals decision that due process is not violated by denying class members the benefit of the judgment declaring the commuter tax to be *ultra vires* is in conflict with four due process cases decided by this Court last term.

The requirements imposed by the Due Process Clause are "flexible and variable" depending on the particular factual situation. *Hewitt* v. *Helms*, 459 U.S. ——, 103 S.Ct. 846, 850 (1983). When the Due Process Clause is "invoked in a novel context," a court must "begin the inquiry with a determination of the precise nature of the private interest that is threatened by the state." *Lehr* v. *Robertson*, 463 U.S. ——, 103 S.Ct. 2985, 2990 (1983).

> [T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of that interest through the procedures used as well as the probable value of additional or different safeguards, and the interest of the government in the procedures under scrutiny.

Landon v. *Plasencia*, 459 U.S. ——, 103 S.Ct. 324, 330 (1983).

> In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. *Celebrezze*, 460 U.S. ——, 103 S.Ct. 1564, 1570 (1983). This Court must determine whether the procedures used meet the essential test of fairness under the Due Process Clause. *Landon* v. *Plasencia*, 459 U.S. at ——, 103 S.Ct. at 30. Under this due process analysis, the decision of the court of appeals should be reversed.

By virtue of the court of appeals decision, respondent may retain approximately $1.8 million of the tax money that was collected pursuant to an illegal tax. (App. at 29a-30a). Petitioners have two separate property interests that have been abridged by this decision. The first of these is petitioners' interest in the millions of dollars of taxes collected pursuant to the now invalidated tax law and the deprivation of the use of these funds since they were collected. *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). Petitioners have a second property interest which arises from the trial court's decision certifying the class and the ultimately favorable class action judgment of October 22, 1980.

Under Rule 23, members of a class who are not present as parties to the litigation are bound by a judgment where they are adequately represented by an individual who meets the requirements of Rule 23. *Hansberry* v. *Lee*, 311 U.S. 37, 42-43 (1940). Petitioner was found to be an "adequate" class representative and the rights of class members were fully litigated before the trial court. Class members were bound by the judgment and thus barred from filing other lawsuits in the District of Columbia or in other jurisdictions by the doctrine of *res judicata*. *Id.* *See also Laskey* v. *International Union (UAW)*, 638 F.2d 954, 956 (6th Cir. 1981); *Research Corp.* v. *Asgrow Steel Co.*, 425 F.2d 1059 (7th Cir. 1970).

Petitioners' due process property interests must be considered in light of the legitimacy and strength of the interests asserted by respondent in denying these claims for refunds. The court of appeals justified refusal to refund the illegal tax by noting that "the financial interests of the District and the public interest would not be served by allowing taxpayers in such a case to bypass statutory procedures for refund." (App. at 7a). The court reasoned that since respondent could not know the full extent of its liability for refunds and could not plan its burden accordingly, respondent had a strong interest

in requiring the filing of an administrative claim for refund. (App. at 7a). This reasoning is erroneous.

Respondent was placed on notice with the filing of the class action lawsuit for refunds filed only a short time after the tax was passed and before the first tax returns were due. The lawsuit apprised respondent of the extent of its liability because the lawsuit attacked the power of respondent to levy the tax. Thus, respondent knew the amount of money that the professional tax had brought into its treasury and the amount of money that would have to be refunded if the tax were declared illegal.

Respondent also advances the argument that its interest in the strict construction of tax refund statutes justifies retention of these funds. Allowing a refund of the illegal tax would have little or no precedential effect on future decisions of the District of Columbia courts which are asked to interpret tax laws that are not *ultra vires*. Moreover, respondent's interest in retaining the $1.8 million at issue is of dubious legitimacy, because these funds were collected illegally on the basis of a tax that is *ultra vires*.

Respondent further asserts an interest in the exhaustion of remedies doctrine (requiring that taxpayers file an administrative claim) which justifies retention of the illegally collected tax money. Whatever abstract interest a state may have in the exhaustion doctrine in the normal course, such an interest is at best minimal where the tax is *ultra vires*. Respondent's interest in imposing an exhaustion requirement is particularly weak because of the numerous exceptions to this doctrine under District of Columbia law. Exhaustion of administrative remedies is not a jurisdictional absolute; for example, taxpayers have been allowed in the past to bypass the administrative process to proceed with an action in court where, as here, the taxpayers had no meaningful abil-

ity to obtain relief at the administrative level. *District of Columbia* v. *Green*, 310 A.2d 848, 856 (D.C.App. 1973). *Accord, District of Columbia* v. *Keyes*, 362 A.2d 729, 737 (D.C.App. 1976), *cert. denied*, 430 U.S. 968 (1977). *Apartment & Office Building Ass'n.* v. *Washington*, 343 A.2d 323, 331-332 (D.C.App. 1975). Thus, respondent's interest in requiring the exhaustion of administrative remedies does not justify the retention of the illegally collected tax money.

Moreover, whatever interest respondent might have in requiring the exhaustion of administrative remedies and in strict construction of its tax statutes is mooted by the class claim for refund. On December 11, 1978, petitioner Kleiboemer filed an administrative claim for refund on behalf of all individuals in the plaintiff class. (App. at 31a-32a). The filing of a class claim for refund by the court-appointed class representative was particularly appropriate in these circumstances; class members were bound by the October 1977 judgment holding the tax lawful and any subsequent suit would have been barred by the doctrine of *res judicata*. *Hansberry* v. *Lee*, *supra*, 311 U.S. at 42-43. The class claim substantially complied with every requirement imposed by Section 47-1586j of the District of Columbia Code.[5] Under these circumstances, respondent's interest in the exhaustion of remedies doctrine and strict construction of its tax statutes is fully satisfied.

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[5] The class claim was made in writing under oath and was filed with the appropriate officials on behalf of the class as described and defined in the trial court's order of October 17, 1977. The class claim set forth the specific ground on which the claim for refund was grounded, *i.e.*, that the tax violated the Home Rule Act and was therefore *ultra vires*. (App. at 31a-32a).

On December 26, 1978, the District of Columbia Department of Finance and Revenue denied the class claim. On January 3, 1979, the trial judge ruled that the class claim did not constitute sufficient compliance with Section 47-1586j of the District of Columbia Code. On January 19, 1979, petitioners filed a notice of appeal from the order rejecting the class claim for refund.

The denial of due process is particularly egregious in these circumstances because many individuals who did not file claims for refunds never received the notice sent in December 1978 to certain taxpayers. (*See* App. at 28a, 30a). The December 1978 notice informed taxpayers that respondent intended to bar their claims if they did not file claims for refunds. Respondent actually had a list of the names and addresses of taxpayers who paid the tax, were class members, and who did not receive actual notice by mail that they might be required to file claims for refunds.

The absence of actual notice runs contrary to the basic tenet of due process that requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice. . . ." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

> Notice by mail or other means as certain to ensure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect liberty or property interests of any party, whether lettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite Board of Missions v. *Adams*, 462 U.S. ——, 103 S.Ct. 2706, 2712 (1983). Respondent could have provided actual notice.[6]

Due process and fundamental fairness require that because all class members were bound by the trial court's judgment, respondent must be bound by the reversal of that judgment. Parties to litigation are bound with respect to every matter that is litigated. *Restatement of Judgments*, §§ 45(c), 68(i) (1942). In sum, failure to bind respondent denies petitioners their right to due process. Accordingly, the decision of the court of appeals should be reversed.

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[6] Respondent rejected as untimely the claims for refunds of $1,494,243 filed by 1,160 taxpayers for the tax years 1975 and 1976. (App. at 30a).

III. This Court should grant review because the holding of the court of appeals is inconsistent with the *American Pipe* doctrine of equitable tolling of statutes of limitation articulated in *Crown, Cork & Seal Co., Inc.* v. *Parker*.

If respondent may, consistent with due process, require individual claims for refunds under Section 47-1586j of the District of Columbia Code, the doctrine of equitable tolling of statutes of limitations is applicable to these facts.[7] The decision holding that Section 47-1586j mandates individual claims for refund by all class members would deprive class members of the benefit of class membership simply because these individuals did not file an apparently futile administrative claim for refund. Such a ruling in effect decertifies the class after final judgment and excludes class members from the benefit of the decision that the tax was *ultra vires*.

To protect the policies behind the class action procedure, this Court held:

> [T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

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[7] Petitioners believe their claim to equitable tolling of the statute of limitations raises an issue of great significance that is a matter of general nationwide application. Even if the court of appeals decision is a matter of "state" law, this Court is "not prevented from reviewing decisions of the District of Columbia Court of Appeals in the same jurisdictional sense that [the Court] is barred from reviewing a state court's interpretation of a state statute." *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980) (citations omitted). Deference to the court of appeals' construction of local federal legislation is inappropriate in "exceptional situations where egregious error has been committed." *Pernell* v. *Southhall Realty*, 416 U.S. 363, 369 (1974) (citations omitted).

The class action rule of the trial court—which is identical to Fed.R.Civ. Pro. 23—was made applicable to the Tax Division of the Superior Court by Public Law 93-407.

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538, 554 (1974), cited in *Crown, Cork & Seal Co., Inc.* v. *Parker*, 462 U.S. ——, 103 S.Ct. 2382, 2395 (1983). "The filing of a class action tolls the statute of limitation as to all asserted members of the class." 103 S.Ct. at 2395 (citation omitted). Thus, the statute of limitations with respect to the claims of the class should be extended from the time the class action was filed until the time of decertification of the class.

In further explaining the doctrine of equitable tolling articulated in *American Pipe*, this Court has rejected arguments similar to those made by respondent regarding the adequacy of notice. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). In *McDonald*, the Court upheld the adequacy of the notice to the defendant provided by the class action complaint, noting that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing [the defendant] with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93, quoting *American Pipe*, 414 U.S. at 555.

The doctrine of equitable tolling has also been applied in class actions to toll time requirements for filing administrative claims. For example, once a member of a class files a complaint with the Equal Employment Opportunity Commission in a Title VII case, the administrative requirement of filing a claim under 42 U.S.C. § 2000e-5(d) is tolled as to all members of the class if the class is ultimately certified and as to all purported class members if the class is not certified, or is subsequently decertified. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975).

The application of the equitable tolling doctrine of *American Pipe* and its progeny to this case is particularly appropriate.

> To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.' Rule 23(b)(3).
>
> We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) . . . . It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

American Pipe, 414 U.S. at 551-52 (footnote omitted).

When, as here, the time period for filing administrative claims has expired five days *prior* to the court of appeals' decision invalidating the tax, failure to toll the three-year period would "frustrate the principal function of a class suit . . . ." *Id.* at 551. Moreover, the sole purpose for the three-year period in the statute is, like the purpose of the limitation statute tolled in *American Pipe*, to require action to be taken within a certain time, namely, to notify respondent within three years from the payment of a tax that the taxpayer seeks a refund and the grounds therefor. Petitioner Kleiboemer did this, both for himself and for members of the class, within months after the first payment of estimated tax had been due, and *before* the first tax returns were due.

Thus, the imposition of the three-year period here would not promote the purpose of the statute.

Just as the Court squarely rejected the argument that *American Pipe* doctrine should be limited to extending the statute of limitations to intervenors or that exhaustion of remedies is required in class actions under Title VII, so also should this Court recognize the application of the doctrine of equitable tolling on these facts.

In the absence of equitable tolling, those taxpayers who paid the professional tax would be unable to obtain the return of the funds that had been illegally taken from them. Failure to require the return of all of the illegally collected tax would reward the District of Columbia for its *ultra vires* action.

In sum, if individual claims for refund under Section 47-1586j of the District of Columbia Code are consistent with due process, fundamental fairness requires equitable tolling of the statutes of limitations for filing administrative claims for refunds of the *ultra vires* tax from the filing of the class action petition for refund on April 6, 1976, to the date of this Court's ruling.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the District of Columbia Court of Appeals should be reversed because respondent's refusal to refund all of the money collected under the *ultra vires* tax denies class members due process. Alternatively, if the Court does not conclude that denial of refunds of the illegal tax to all class members automatically violates the Due Process Clause of the Constitution, the Court should grant a writ of certiorari to rule that the doctrine of equitable tolling applies to these facts.

Respectfully submitted,

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-123, 79-547, and 81-1232

AXEL-FELIX KLEIBOEMER, RICHARD A. BISHOP, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA,
Appellee.

Appeal from the Superior Court of the
District of Columbia
Civil Division

(Hon. John D. Fauntleroy, Trial Judge)

(Argued November 3, 1982 Decided March 22, 1983)

Bradley G. McDonald, with whom *Philip L. Kellogg*, *James L. Lyons*, *John M. Bixler*, and *Ronald D. Aucutt* were on the briefs, for appellants.

Richard L. Aguglia, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *James E. Lemert*, Assistant Corporation Counsel, were on the brief, for appellee.

Before KERN, PRYOR and BELSON, *Associate Judges.*

KERN, *Associate Judge*: This appeal is the residuum of the convoluted litigation which ultimately resulted in a decision by this court en banc (one judge dissenting) that the City Council had impermissibly imposed a tax on nonresident unincorporated professionals and personal service businesses. *Bishop v. District of Columbia*, 411 A.2d 997 (en banc), *cert. denied*, 446 U.S. 966 (1980).

Questions of statutory interpretation are presented in this appeal: the meaning and applicability to the instant

case of D.C. Code § 47-1586j(a) (1973), requiring a taxpayer to file an administrative claim of overpayment of tax within a fixed period of time, and D.C. Code § 47-2413(c) (1973), providing for the payment of interest on overpayments of taxes.

I

The events pertinent to this appeal occurred as follows. In March 1976, appellant Kleiboemer paid the now invalidated tax and promptly filed an individual administrative claim for refund, which the District denied. Thereupon, he filed a class action petition for refund in the Tax Division of the Superior Court seeking a refund of "all amounts paid by all taxpayers who are members of the petitioner's class." (Record at 16.) In October 1977, the trial court granted appellant's motion for class action determination, pursuant to Super. Ct. Civ. R. 23(b)(1)(A)[1] and ordered that

> the class shall consist of all nonresidents who are subject to the tax in question . . . and who have paid the tax.

(Record at 47.) The trial court during October 1977 entered two further orders holding the tax unlawful but declaring that appellant Kleiboemer and members of the class who were fiscal year taxpayers were entitled to a refund for all taxes paid prior to December 1, 1975, "provided they have complied with or comply with . . . § 47-1586j." (Record at 82.)

It is agreed by the parties that if § 47-1586j is applicable to all nonresident taxpayers who paid the tax in

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[1] The rule provides in pertinent part:

> An action may be maintained as a class action if . . . the prosecution of separate actions by . . . individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . .

1975, their claims for refund must have been filed by April 15, 1979. In December 1978, appellant Kleiboemer filed with the District, on behalf of the class, a claim for refund, which the District denied. Soon thereafter, the trial court ruled that the class claim for refund filed by appellant Kleiboemer did not comply with the provisions of § 47-1586j, but concluded that "individual notice to the members of the class of the statutory requirement to file a claim for refund is appropriate." (Record at 110.) Notice of the filing requirement was then included in the District's mailing of 1978 tax return forms. However, some erstwhile members of the class did not actually receive the mailing, because they no longer operated unincorporated businesses in the District and hence were no longer obligated to file a return. Accordingly, the court in March 1979 directed the District to issue a press release to publicize the need by those who had paid the tax for 1975 to file a refund claim by April 15, 1979. On April 5, 1979, the court held that sufficient notice had been given to the class members regarding the administrative claim requirement. (Record at 138.) On April 15, the filing deadline for the 1975 tax year expired.

After the tax was held invalid, first by a division of this court, then by the full court en banc, the parties entered into a consent judgment, pursuant to which the class members were again notified, by a mailing, of the requirement that they file an administrative claim. At the time of that second mailing, however, the filing deadline for taxable years 1975 and 1976 had already expired.

On September 24, 1981, the trial court ruled as follows on the issues which had been left unresolved by the earlier consent judgment: (1) that "the timely filing of individual claims [for refund] at the administrative level by affected taxpayers is a prerequisite to refunds in this suit"; and (2) that interest should be computed "from the date such individual claims are timely filed until the date of the making of the refund." (Record at 176.)

It is from these September 24 rulings that the present appeal is taken.

II

As to the requirement of an individual claim for refund, § 47-1586j(a) provides in pertinent part as follows:

> No . . . refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer . . . .

It is agreed that a number of nonresidents who paid the tax for the years 1975 and/or 1976 did *not* file a claim for refund of such tax payments within three years. Appellants, however, urge that the whole purpose of a class action pursuant to Rule 23(b)(1)(A)—to eliminate the possibility of inconsistent adjudications if each member of the class were to sue individually—is frustrated by requiring that *each* taxpayer who is a member of the class must have filed an administrative refund claim in order to obtain a refund after the tax has been judicially determined to be unlawful. However, in *District of Columbia v. Keyes*, 362 A.2d 729 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977), we held that a class action [2] for

[2] It is not significant that *Keyes* did not involve a certified class action. The rules of the Tax Division at that time did not include class certification procedures; however, the court in *Keyes* recognized that new class action rules had been adopted and specifically stated that "this decision may be considered to have precedential effect in future class action tax refund cases." *Id.* at 732 n.5, 736. Further, as pointed out in the District's brief, at the time Congress directed the Superior Court to adopt class action rules for tax cases, the federal courts consistently held that the filing of an administrative claim was a prerequisite to recover refunds. *See, e.g., Heisler v. United States*, 463 F.2d 375 (9th Cir. 1972) (per curiam), *cert. denied*, 410 U.S. 927 (1973) (class action); *McConnell v. United States*, 295 F. Supp. 605 (E.D. Tenn. 1969) (class action). There is no reason to believe that Congress intended a different rule for the District of Columbia. *See* District of Columbia Real Property Tax Revision Act of 1974, Pub. L. No. 93-407, § 428, 88 Stat. 1036, 1057 (1974).

refund of taxes paid was incorrectly entertained by the trial court because the taxpayers seeking refund had *not* first filed an administrative claim for refund.

Appellants contend (Brief at 18) that the trial court's ruling "would undercut the policy of Rule 23 . . . to allow class representatives to vindicate the rights of those who lack the knowledge or resources to pursue a remedy individually and to obtain justice in the courts." However, as we pointed out in *Keyes*, the Congress enacted specific legislation in § 47-1586j requiring an individual to file a refund claim and we may not ignore such a legislative mandate.[3] This is particularly true since, as we explained in *Keyes*, *supra*, 362 A.2d at 732, the remedy is purely statutory: "[r]ecovery of taxes illegally or erroneously assessed and voluntarily paid . . . is a matter within the purview of the legislative branch." We further noted, "Tax statutes are necessarily formalistic and often technical. It is essential that we adhere to their technicalities, even if at times a seeming hardship results to the taxpayer." *Id.* at 737. This is so particularly because the statutory prerequisite of a claim for refund is jurisdictional, as we also noted in *Keyes*. *Id.* at 733.[4]

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[3] We note that the trial court did require the District to notify taxpayers by public announcement of the need to file their refund claims within a certain time period, and that the trial court later held that the taxpayers had had reasonable and sufficient notice. Under these circumstances, the members of the class must be deemed to have the knowledge to take the steps required by statute.

[4] Accordingly, we cannot agree either with appellants' argument that, even if an administrative claim must be filed, the claim for refund filed by appellant Kleiboemer on behalf of the entire class satisfies the requirements of § 47-1586j. The statute plainly states that the claim must be filed "by the taxpayer." Moreover, the trial court specifically ruled on January 3, 1979, that Kleiboemer's claim for refund on behalf of the class did not comply with § 47-1586j or with the order of October 27, 1977 requiring compliance with § 47-1586j. Appellants did not appeal from the January 3 order. *Dellums v. Powell*, 184 U.S. App. D.C. 324, 566 F.2d 216 (1977), *cert. denied*, 438 U.S. 916 (1978), cited in appellants' reply brief, is

Appellants also maintain that in this case *Keyes* does not require the filing of individual claims for refund by members of the class because the filing requirement—essentially an application of the doctrine of exhaustion of remedies—need not be met when resort to the administrative process would be futile. However, we specifically rejected that argument in *Keyes*. There we acknowledged that, in *District of Columbia v. Green*, 310 A.2d 848, 856 (D.C. 1973), we had permitted taxpayers who had bypassed the administrative process to proceed with an action in court *in part* because those taxpayers had " 'no meaningful ability to challenge [the] assessment at all' " at the administrative level. *Id.* at 734 n.11. However, in *Keyes* we emphasized that the futility of the administrative appeal was only one of the several "extraordinary circumstances" on which we had based the *Green* decision; that "only injunctive relief was sought"; and that "it would be a rare instance when taxpayers would not bypass [the administrative procedure] at great peril." *Id.*[5]

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distinguishable: it involved a broad statute expressly permitting notice of a claim against the District to be given by the claimant's agent. *Id.* at 336-37; 566 F.2d at 228-29. Moreover, the court in *Dellums* found that notice by agent would not conflict with the purposes of that claim requirement; whereas, in this case, the purposes of the limitation period discussed *infra*, at 8-9, would not be served by a departure from the express terms of the statute or by a holding that "substantial compliance" satisfies the statute.

[5] Appellants also cite to *Thorn v. Jefferson County*, —— Ala. ——, 375 So. 2d 780 (Ala. 1979), where the Supreme Court of Alabama held that the administrative remedy need not be exhausted when a class action is brought challenging a tax as illegal and void. However, the court in *Thorn* relied upon *Graves v. McDonough*, 264 Ala. 407, 88 So. 2d 371 (1956), where the administrative remedy provided by statute gave aggrieved taxpayers only twenty days in which to object to the tax, as compared with the three-year period for filing claims under § 47-1586j.

Instead, we explained in *Keyes* that the extraordinary equitable considerations were not present which had led us in *Green* to permit a limited exception to an essential requirement of the purely statutory refund procedure. Nor are they present in the instant case. It was not until October 17, 1977, that the tax in question in this case was initially held unlawful—a year and one half after it first came due for the 1975 tax year. An appeal was taken promptly from that ruling. Thus it is not unreasonable to conclude that aggrieved taxpayers had ample opportunity prior to the ruling of October 17, 1977, to pursue their statutory remedy with some hope that they might be successful. Even following the trial court decision upholding the tax, the possibility of reversal endured until the appeals process was completed.[6] During the period of litigation, extensive efforts were exerted, by mail and by publication, to inform taxpayers of the need to file a claim; and the trial court expressly held such notice to be sufficient. The trial court's orders of October 27, 1977 and January 3, 1979 made it clear to appellants that individual claims for refund were a necessary precondition to collecting refunds, yet appellants did not appeal from those orders. In fact, appellants conceded the necessity of claims for refund soon after the October 27 order issued. (Record at 84-85.)

In addition, although without question the District had "notice" of the class action challenging the legality of the tax, absent the expected filing of claims at the administrative level, the District could not know the full extent of its liability for refunds and could not plan its budget accordingly. As we noted in *Keyes, supra*, 362 A.2d at 736-37, the financial interests of the District and the public interest would not be served by allowing taxpayers in such a case to bypass the statutory procedures for refund.

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[6] Accordingly, we do not find persuasive appellants' argument that a requirement of strict compliance with the statute is fundamentally unfair.

Finally, appellants cite to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and urge (Brief at 35) that even were we to conclude § 47-1586j required individual taxpayers for 1975 and 1976 to file refund claims, nevertheless the three-year limitation period for filing the administrative claims should be deemed tolled from the time the class action was filed in April 1976 until this court's ruling on appeal as to the applicability of § 47-1586j to the instant case. Appellants also cite two decisions in class action discrimination cases, *see, e.g., Barrett v. United States Civil Service Commission*, 439 F. Supp. 216 (D.D.C. 1977), in which the equitable tolling doctrine for class actions has been held to toll the limitations period for administrative complaints. However, in determining in any given instance whether a statute of limitations should be tolled, we must examine the legislative purposes behind the limitation provision to determine whether they are effectuated by the tolling. *Timoni v. United States*, 135 U.S. App. D.C. 407, 412, 419 F.2d 294, 299 (1969), *citing Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 426 (1965).

The policy considerations which favor a tolling of the limitation periods in discrimination suits brought under remedial statutes are not present in the context of a challenge to a tax statute. As we have said, *supra* at 6, tax statutes are to be strictly construed. In addition, one of the important purposes served by the three-year filing deadline for tax refund claims is a practical one—to protect the District against financial instability by setting a date certain by which the District may know the precise extent of its liability for refunds. *See supra*, at 8; *District of Columbia v. Keyes, supra*, 362 A.2d at 736-37.

Moreover, implicit in the Supreme Court's opinion in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), was the view that tolling is proper with respect to a particular cause only for so long as the class action continues to protect that cause. Once a final ruling adverse

to the class is entered and becomes appealable, tolling is no longer proper.[7]

Here, the trial court in October 1977 ruled that those taxpayers who paid the tax for 1975 were entitled to refunds "provided they have complied with or comply with . . . § 47-1586j." In January 1979, the trial court ruled that appellant Kleiboemer's claim for refund filed on behalf of the class did not comply with § 47-1586j. Thus, the issue of the applicability of § 47-1586j to the members of the class was raised early on and was susceptible to appeal by appellants.[8] Under these circumstances we cannot agree that compliance with the statute

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[7] In *United Airlines*, the Supreme Court held that, where class certification had been denied early in a case but was not appealable until final judgment, and where the named parties had declined to appeal from that order, post-judgment intervention by putative class members was permissible for purposes of appealing the denial of class certification. 432 U.S. at 394-96. In so holding, the Court noted that, once the order became final and appealable, it was "critical" that the appeal was taken promptly: "In short, as soon as it became clear . . . that the interests of the unnamed class members would no longer be protected . . . [respondent] promptly moved to intervene to protect those interests." *Id.* at 394.

[8] To be appealable, an order must be final. D.C. Code § 11-721(a) (1981). However, final orders for purposes of the statute are not limited to final judgments which terminate the action. *Frost v. Peoples Drug Store, Inc.*, 327 A.2d 810, 812 (D.C. 1974). The test of finality is whether the orders requiring individual compliance with § 47-1586j disposed entirely of that issue; or whether they were "open, unfinished, or inconclusive," or were "but steps towards final judgment." *See Crown Oil and Wax Company of Delaware v. Safeco Insurance Co. of America*, 429 A.2d 1376, 1379 (D.C. 1981); *Trilon Plaza Co. v. Allstate Leasing Corp.*, 399 A.2d 34, 37 (D.C. 1979), *quoting Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Applying these principles to the two orders here, we conclude that they were final and appealable with respect to the applicability of § 47-1586j to the instant case. We do not view the October 27 order as having reconstituted the class for purposes of challenging the legality of the tax.

was tolled solely by reason of the fact that appellants pursued their challenge to the validity of the tax.

Accordingly, we find no error in the trial court's September 1981 ruling that the timely filing of individual claims for refund at the administrative level was a prerequisite to recovery of refunds following this court's decision that the tax was unlawful.

III

We turn next to the second statute in question, § 47-2413 (c), which provides in pertinent part as follows:

> [I]f it is determined by the . . . Superior Court that there has been an overpayment of any tax . . . interest shall be allowed and paid on the overpayment . . . *from the date the overpayment was paid until the date of refund*, but with respect to that part of any overpayment which *was not assessed and paid as a deficiency or as additional tax interest shall be allowed and paid only from the date of filing a claim for refund or a petition to the Superior Court* . . . .

(Emphasis added.) The trial court here concluded that under the statute interest on the District's refund of taxes paid by the nonresidents (and determined to have been unlawfully imposed) was to be computed only from the date each such taxpayer filed his claim for refund rather than from the date such taxpayer paid the tax which this court invalidated. Appellants concede (Brief at 43) that most of the taxpayers who paid the tax did *not* pay as the result of an assessment of deficiency by the District. Accordingly, we are constrained by the express language of the statute set forth above to uphold the trial court's ruling that interest on the taxpayer's payment of the tax, not assessed as a deficiency or as additional tax, must run from the date the taxpayer filed a petition or claim for refund, rather than from the date the taxpayer overpaid the tax.

However, appellants (Brief at 43) point to the fact that they filed in the trial court pleadings challenging the validity of the tax at issue "prior to April 15, 1976, the earliest date on which any of the taxes involved were deemed to have been paid." They argue from this fact that the District was "apprised" at this early date of its potential liability to the taxpayers for the return—with interest—of the tax paid, should it be declared to have been illegally imposed. Therefore, appellants urge, they met the purpose of the statute, as reflected by its history,[9] *viz.*, to alert the District to its potential liability; and that by reason of the petitions filed interest should be paid from the date of overpayment or the due date of the return, whichever is later.[10]

The House and Senate committee reports do not, in our view, suggest that § 47-2413(c) should be given any construction other than its plain meaning. They refer to the District's being apprised of the fact that "an" overpayment has been claimed, thus suggesting that individual claims or petitions were intended. Further, the language of the committee reports does not indicate that

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[9] *See* H.R. REP. No. 1977, 82d Cong., 2d Sess. 4 (1952); S. REP. No. 1471, 82d Cong., 2d Sess. 4 (1952).

[10] Appellants also point to the fact that the statute refers to the filing of either a claim *or* a petition to the Superior Court, and that the words "by the taxpayer," included in § 47-1586j, are conspicuously absent from § 47-2413(c). (Reply Brief at 8.) It is therefore arguable that the class action petition filed by appellant Kleiboemer triggered the allowance of interest for the entire class. However, we must construe the statute as a whole, in context, according to common understanding of its terms. Although § 47-2413(c) does not expressly require that a petition or claim be filed "by the taxpayer," it refers only to "an" overpayment or "the" overpayment, and references in every other subsection of § 47-2413 are to "the taxpayer." Moreover, there is no indication whatsoever in the legislative history of § 47-2413 that Congress had anything other than the filing of a claim or petition by the individual taxpayer in mind when it enacted § 47-2413.

mere notice that the taxing statute has been challenged will be sufficient to comply with § 47-2413(c). Individual claims are needed, as we have discussed, *supra* at 8-9, so that the District will know the exact amount of refunds actually claimed and can plan accordingly. Since we are interpreting and applying a statute which is clear on its face, and since appellants have not persuaded us that the language of the statute admits of more than its natural meaning, we are obliged to apply § 47-2413(c) as written. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); 2A Sutherland, Statutes And Statutory Construction § 46.01 (1973).

Therefore, we also affirm the trial court's ruling that interest on the amounts refunded to the taxpayers in the instant case who did not pay the tax because of an assessment of deficiency runs from the respective dates they filed their claims for refund, rather than from the dates they paid the tax.

Accordingly, there being no error in either of the challenged rulings, the judgment of the trial court is affirmed.

So ordered.

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-123, 79-547, and 81-1232

AXEL-FELIX KLEIBOEMER, RICHARD A. BISHOP, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA,
Appellee.

Appeal from the Superior Court of the
District of Columbia

(Hon. John D. Fauntleroy, Trial Judge)

(Argued November 3, 1982 Decided September 7, 1983)

Bradley G. McDonald, with whom *Philip L. Kellogg*, *James L. Lyons*, *John M. Bixler*, and *Ronald D. Aucutt* were on the briefs, for appellants.

Richard L. Aguglia, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *James E. Lemert*, Assistant Corporation Counsel, were on the brief, for appellee.

Before KERN, PRYOR and BELSON, *Associate Judges.*

SUPPLEMENTAL OPINION UPON APPELLANTS' PETITION FOR REHEARING

The division in its opinion issued on March 22, 1983 characterized, prophetically as it turns out, this case as "the residuum of . . . convoluted litigation." *Kleiboemer v. District of Columbia*, 458 A.2d 731, 732 (D.C. 1983). Appellants in their petition for rehearing point out two misstatements which crept into the opinion through clerical error, *viz.*, two references to the trial court's October

17, 1977 order as holding the tax at issue "unlawful" when in fact the court held the tax lawful. Appellants also point to an error in the statement of facts undergirding this court's conclusion that the trial court's judgment should be affirmed. Appellants, hereafter denominated petitioners, urge that such errors materially influenced the outcome of the appeal and require reconsideration by the division of its holding, as well as suggest that certain of their arguments were not fully considered.

First, dealing with the clerical errors to be corrected, the word "unlawful" appearing in the middle of the first full paragraph in Part I of the division opinion, 458 A.2d at 732, describing the trial court's order, should have read "lawful"; and the word "unlawful" appearing on the ninth line of the last paragraph on 458 A.2d at 734 also should have read "lawful."

Next, we turn to the petitioner's assertion of factual error with respect to the orders entered by the trial court in the instant case.

I.

There were three orders of the trial court relating to the requirement for individual administrative claims as a prerequisite to taxpayers' collecting refunds. On October 27, 1977, in ordering refunds for certain fiscal year taxpayers, the court stated that those taxpayers were entitled to refunds "provided they have complied with or comply with D.C. Code 1973, § 47-1586j." The taxpayers did not appeal from that order. On January 3, 1979, the trial court ruled that Kleiboemer's claim for refund on behalf of the class did not comply with § 47-1586j or with the order of October 27, 1977. A timely appeal was taken from the January 3 order on January 19 (No. 79-123) and again on May 7, 1979 (No. 79-547).[1] On Sep-

[1] The appeal taken on January 19 was an appeal only from the January 3 order. The second appeal was taken following the trial court's decision of the case-in-chief and was consolidated with the first appeal.

tember 24, 1981, the trial court ruled that timely individual administrative claims were a prerequisite for refunds, and that interest was to be computed from the date of the individual claims. A timely appeal was taken from that order (No. 81-1232) and was consolidated with the earlier appeals from the January 3 order.

The division stated in its opinion that an appeal was taken only from the September 24, 1981 rulings and that neither the October 27, 1977 order nor the January 3, 1979 order was appealed; in fact, the January 3 order *was* appealed.

The division concluded, 458 A.2d at 734 n.4, that the class claim for refund filed by Kleiboemer does not satisfy § 47-1586j because (a) the plain language of the statute requires individual claims, (b) petitioners "did not appeal from the January 3 order," and (c) *Dellums v. Powell*, 184 U.S. App. D.C. 324, 566 F.2d 216 (1977), *cert. denied*, 438 U.S. 916 (1978), cited in petitioners' brief on appeal, is distinguishable. Petitioners contend that, because the court viewed this issue as waived by failure to appeal, it was never considered on the merits, and the California cases cited in their brief were never considered.

However, the essential reason for the division holding was that the plain language of the governing statute required it. The additional two reasons referred to above were more in the nature of persuasive discussion. Moreover, the two principal California cases which petitioners contend the division should have discussed in the opinion are not precisely on point. *San Jose v. Superior Court of Santa Clara County*, 12 Cal. 3d 447, 525 P.2d 701 (1974); *Lattin v. Franchise Tax Board*, 75 Cal. App. 3d 377, 142 Cal. Rptr. 130 (1977). The *San Jose* case concerned a statutory claim requirement as a prerequisite to the maintenance of a class action for damages, not as a prerequisite to collecting a tax refund. The statute at issue in that case (apparently a general claims statute), unlike

the District of Columbia tax statute at issue here, expressly permitted a claim to be filed "by the claimant *or by a person acting on his behalf.*" *San Jose, supra* at 12 Cal. 3d at 455, 525 P.2d at 706 (emphasis added). The *Lattin* case was very closely analogous to *District of Columbia v. Keyes*, 362 A.2d 729 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977), in that it concerned the requirement of an administrative claim for refund as a prerequisite to maintaining a class action challenging the validity of the tax, in contradistinction to an ancillary suit seeking recovery once the tax has been held invalid. *Lattin* relied almost entirely upon the *San Jose* case in holding that the administrative claim requirement would be satisfied for purposes of class action certification by a claim filed on behalf of the class.[2] As with the *San Jose* case, the context was thus different from that of the instant case, where the class action suit has already been decided and the issue is instead whether individual claims are required for recovery.

Further, although petitioners contend that the pertinent tax statute involved in *Lattin* was virtually identical to § 47-1586j, they cited only the portion of the California tax code which, like *part* of § 47-1586j, requires the claim to be in writing and to state the specific grounds for the claim. Petitioners did not mention that portion of the California tax code which, like § 47-1586j, requires a claim for refund to be filed "by the taxpayer."[3]

---

[2] Although the court in *Lattin* referred to the suit as seeking refunds for the class, the court stated that " 'the sole issue presented on this appeal is whether or not a class should be certified and represented by Appellants Lattin.' " 75 Cal. App. 3d at 379, 142 Cal. Rptr. at 132. The plaintiffs in that case sought to have the applicable California tax statute declared unconstitutional.

[3] Petitioners cited (Brief at 32) CAL. REV. & TAX CODE § 19055 (West 1970). The pertinent section of the California code, Cal. Rev. & Tax Code § 19053 (West Supp. 1970-82), *does*, like the D.C. Code, require a claim to be timely filed "by the taxpayer." However, as discussed above, *Lattin* dealt with the necessity of a

Moreover, the policy considerations underlying both those California cases was governmental immunity, not exhaustion of administrative remedies. Those opinions held that substantial compliance with the claims statutes by the filing of a class claim was sufficient, but, as we have explained, for different purposes than in the instant case. Finally, even if we viewed those cases as persuasive, this court certainly need not follow them.

In reciting the factors in this case which weigh against permitting an exception, pursuant to *District of Columbia v. Green*, 310 A.2d 848, 856 (D.C. 1973), to the requirement that an administrative claim be filed, as a prerequisite to suit, the division states, 458 A.2d at 735, in part incorrectly, that petitioners did not appeal from the October 27 and January 3 orders which made it clear that individual claims were required. Petitioners do not specifically address how this particular error here may have affected the rationale. However, deletion of the erroneous statement of fact from the opinion affects the list of equitable factors in this section only minimally. We are still left with the following:

> The tax was not initially held lawful until a year and one-half after it came due and that decision was promptly appealed, so that taxpayers might have pursued their administrative remedies with some hope of success.[4]

---

claim's having been filed and rejected as a precondition to maintaining a lawsuit to recover upon payment of a tax which is void, presumably pursuant to Cal. Rev. & Tax Code § 19082 (West 1970) (creating the right of action after claim denied if tax void). *Lattin* did not concern the claim as a precondition actually to collecting a refund if the class suit were successful, as here; and the court in *Lattin* did not construe the California code provision which is the companion to that portion of § 47-1586j at issue in this case.

[4] The argument is made that once the trial court upheld the tax, most taxpayers would not likely have filed a claim at all, considering it pointless. It was not until 5 days after the expiration of the statutory period for filing claims for the 1975 tax year that a

Extensive notice of the claim requirement was given in the media, in business and professional publications, by mail, and in seminars.

The trial court expressly held this notice to be sufficient.

No appeal was taken from the October 27 order first giving petitioners notice that individual claims were required (and petitioners appeared to understand that the October 27 order did require individual claims).

At 458 A.2d at 735-36, in the discussion of equitable tolling, we explain that tolling is no longer proper once a final ruling adverse to the class is entered and becomes appealable (and is not appealed). We then reason, 458 A.2d at 736 n.8, that the October 27, 1977, and January 3, 1979, orders were final and appealable with respect to the applicability of § 47-1586j and that tolling is not proper (since they were not appealed). Petitioners maintain that the division's decision on equitable tolling was materially and adversely influenced by the incorrect assumption that the January 3 order was not appealed when it was, in fact, promptly appealed.

Since the October 27 ruling was in the context of an order directing refunds for only a limited group of these taxpayers (1975 fiscal-year basis taxpayers), it might not be viewed, standing alone, as resolving the issue sufficiently for *all* affected taxpayers as to make clear that the class action would no longer protect their interests in this respect if the order were not appealed. *See Kleiboemer, supra*, 458 A.2d at 735-36 n.7. Also, considering how the October 27 order was worded ("provided that" the taxpayers comply with the claim requirement), and considering that this part of the order *apparently*

---

division of this court held the tax unlawful. However, this argument must be viewed in light of the considerable publicity surrounding this litigation and the claim requirement.

was not a major controversy, if at all, at the time (since the focus was on the validity of the tax), we recognize that the decision as to whether it was a final, appealable order was a close one. Further, petitioners contend that the October 27 order left open the question whether a class claim for refund satisfied § 47-1586j.

However, we still conclude that the October 27, 1977, order constituted a final order which should have been appealed if petitioners were to avail themselves of equitable tolling. Accordingly, since the filing deadline for the 1975 tax year did not expire until a year and one-half later, on April 15, 1979, equitable tolling is not appropriate. The order certainly settled the question finally for the taxpayers who were to get refunds at that time, and it put the petitioners on clear notice that compliance with § 47-1586j was required. The trial court cited *Keyes* in its October 27 order, and in so doing, it further signaled that individual compliance was contemplated, because *Keyes* emphasized strict construction of tax refund statutes. The fact that petitioners vigorously pursued various avenues for notifying individual taxpayers of the requirement (even though they urged the sufficiency of a class claim) indicates that they understood the October 27 order, literally read, to require individual claims.

II.

Finally, we turn to several additional assertions of error raised in the petition for rehearing:

At 458 A.2d at 735, the division states that "appellants conceded the necessity of claims for refund soon after the October 27 order issued." We cite to petitioners' motion for an order compelling the District to include notice to taxpayers of the filing requirement in the December 1978 tax mailings. Petitioners argue that they took such action only out of an abundance of caution, to protect their clients' interests. However, in that motion petitioners referred to the October 27 order and described the

administrative "claims" (not singular, as if they believed a single class claim might suffice) as being "necessary." Since only the petitioners themselves can say how they construed the October 27 order at that time, perhaps to say that they "conceded" the issue was to use too strong a word. However, their actions in pursuing individual notice, and their language in this motion, are a fair indication that they understood individual notice to be required and therefore should have appealed the October 27 order. The District cites to the transcript of October 7, 1978, at 39, where counsel for petitioner described the October 27 ruling as specifically requiring the "members of the class" (not the class as an entity) to comply with § 47-1586j, as support for this reading as to how the October 27 ruling was understood by petitioners.

Petitioners contend as well that the division opinion failed to address their argument that members of the class, having been bound by the trial court judgment adverse to them until this court reversed it (*after* the statutory period for claims expired), would be denied due process if they were denied the benefits of this court's final judgment holding the tax illegal. This argument was made in less than 3 pages of a 49-page brief. No cases were cited in direct support of the argument, and it was essentially urged that it would be extremely harsh and fundamentally unfair to reach the result the division did reach. This argument *was* addressed in the division opinion, 458 A.2d at 735 n.6, in which we state that, because the trial court decision was appealed and subject to reversal, this contention was unpersuasive. We remain of that view.

Petitioners also make several arguments in which they urge that the division erred in concluding that interest on the amounts refunded to most taxpayers runs from the dates they filed individual claims for refund, rather than from the dates they paid the tax. We have thoroughly considered each of petitioners' arguments on the

interest issue and find them insubstantial.[5] The division opinion rests upon a straightforward reading of D.C. Code § 47-2413(c) (1973).

In sum, therefore, each of petitioners' assertions of error is either unfounded or had no substantial impact upon the division's holdings. Accordingly, the petition for rehearing is denied.

So ordered.

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[5] Petitioners maintain that the division opinion disregards the differences between subsection (c) and other subsections of § 47-2413. However, it is precisely because the other subsections of § 47-2413 pertain to subject matter affecting only individual taxpayers that we concluded subsection (c) also must concern only individual taxpayers. Petitioners also argued at length that the fiscal concerns of the District are entirely different with respect to interest than in the context of the main claim for a refund. However, this argument overlooks the fact that a greater sum of money is at stake for the District on the interest issue than on the question of recovery on the main claims. Brief for Appellee at App. 1. With respect to petitioners' contentions concerning the use of legislative history in the division opinion, we note that the language of § 47-2413(c), in the context of the entire section, has a plain and natural meaning. Petitioners' position, *viz.*, that the petition filed in April 1976 in this case fulfilled the statutory requirement, is arguable only because of the omission of specific reference to the individual taxpayer.

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2379

AXEL-FELIX H. KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

ORDER GRANTING PETITIONER'S MOTION FOR CLASS DETERMINATION

Upon consideration of petitioner's Motion for Class Determination, respondent's response thereto and good cause appearing therefore, the Court finds as follows:

1. The class is so numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the class.

3. The claims of the representative party are typical of the claims of the class.

4. The representative party will fairly and adequately protect the interests of the class.

5. The within suit is maintainable as a class action pursuant to the provisions of Rules 23(b)(1)(A) and 23(b)(1)(B) of the Superior Court Civil Rules.

WHEREFORE, IT IS HEREBY ORDERED by the Court this 17th day of October, 1977, that the within cause of action may and shall be maintained as a class action; and it is

FURTHER ORDERED that the class shall consist of all non-residents who are subject to the tax in question by virtue of engaging in unincorporated personal service businesses in the District of Columbia and who have paid the tax.*

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

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* After reviewing Super. Ct. Civ. R. 23 and the applicable cases, this Court is satisfied that petitioners can maintain this action as a class action under Rule 23(b)(1)(A) and arguably under Rule 23(b)(1)(B). The Court relies only on Rule 23(b)(1)(A). cf. *McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975); *Landau* v. *Chase Manhattan Bank, N.A.*, 367 F. Supp. 1992 (SD NY 1973); *Goldman* v. *First National Bank of Chicago*, 56 FRD 587 (ND Ill. 1972). Here as distinguished from the above cases, the failure to maintain a class action would impose incompatible standards of conduct on the District of Columbia. This is not a simple action for a money judgment but rather a case which calls into question a tax statute of the District. It is therefore possible that a contrary opinion could impose upon the District incompatible standards of conduct; collecting the tax from some and not from others. Moreover, this Court cannot overlook the impact on the fiscal affairs of the District of Columbia in the event of inconsistent decisions. For these reasons the Court concludes the case is properly brought under Rule 23(b)(1)(A).

As to petitioner Bishop, he has requested that he not be included as a member of this class. While to allow him to opt out of a 23(b)(1) action is unusual, the problems of opting out are not involved here since Bishop has actually joined with Kleiboemer and both cases have been presented on joint records and joint arguments.

APPENDIX D

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2379

AXEL-FELIX KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

[Filed Oct. 27, 1977]

ORDER

Pursuant to the Opinion and Order entered in this case on October 18, 1977, as modified by the Memorandum Order, entered on October 27, 1977, it is hereby

ORDERED that the class consists of those non-resident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973 Sec. 47-1574b (Supp. IV 1977), except for Richard A. Bishop (see Tax Docket No. 2362), and it is further

ORDERED that the petitioner, Axel-Felix Kleiboemer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further

ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, pro-

vided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j.*

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

Dated: October 27, 1977

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* Cf: *D.C.* v. *Keyes*, 362 A.2nd 729 (D.C. App. 1976).

APPENDIX E

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2379

AXEL-FELIX KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

[Filed Mar. 23, 1979]

ORDER

Upon consideration of the report regarding the feasibility of identifying class members who were not previously mailed a notice pursuant to this Court's order of December 20, 1978, and of the supplemental pleadings of the parties and argument of counsel, it is hereby

ORDERED, that respondent District of Columbia shall, not later than March 22, 1979, issue a press release to the various District of Columbia media in its normal manner,* notifying members of the class who were not previously mailed a notice pursuant to this Court's order of December 20, 1978, of their right to file claims for refunds respecting 1975 and subsequent tax years.

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* In the normal course of business, the District's press releases are dispatched to the Washington Post, Washington Star, Associated Press, UPI, 6 local weeklies (e.g., the Afro-American), the four major television stations and approximately 12 local radio stations by any one or all of the following three methods: a recording line, mailings and/or by actual delivery of the press release to the press room in the District Building.

Such press release shall consist of an announcement indicating its general purpose, that is, to notify those class members who were not reached by the District's December, 1978 mailing of their right to file claims for refunds respecting 1975 and subsequent tax years. A copy of the notice mailed in December, 1978 shall be appended to the announcement; and it is further

ORDERED, that if the notice information in the press release described above is disseminated *in any reasonable manner* by one of the two major local newspapers (the Washington Post or the Washington Star), no further notice to the affected class members shall be required. If the press release described above is not disseminated by either of the two major local newspapers (the Washington Post or the Washington Star), *in any reasonable manner*, but by various other news media as described in this Order, whether further notice to affected class members shall be required is at the discretion of the Court.

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

3/21/79.

APPENDIX F

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Tax Division

Docket No. 2379

AXEL-FELIX KLEIBOEMER,
Petitioner,
v.
DISTRICT OF COLUMBIA,
Respondent.

[Filed Apr. 6, 1979]

ORDER

Upon consideration of this Court's order of March 21, 1979 (filed March 23, 1979), and it appearing to the Court that the District of Columbia issued a press release to the various District of Columbia media notifying members of the class who were not previously mailed a notice pursuant to this Court's order of December 20, 1978, of their right to file claims for refunds respecting 1975 and subsequent tax years; and it further appearing that the notice information in the press release was broadcast over three local radio stations (WHUR, WOOK, WGMS), and published in the Washington Informer on March 29, 1979, and in the Washington Post on April 5, 1979, it is hereby

ORDERED, that the notice information of the District of Columbia's press release was disseminated in a reasonable manner within the meaning of this Court's order of March 21, 1979; that no further notice to the affected class members shall be required pursuant to this Court's order of March 21, 1979; and that counsel for the class members have fulfilled their obligations to the class as regards informing the class of the necessity to file claims for refunds.

/s/ John Garrett Penn
Judge
April 5, 1979

APPENDIX G

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

[SEAL]

Associate Director for
Audit, Compliance &
Investigation Administration

June 25, 1982

MEMORANDUM

TO: Richard L. Aguglia
Assistant Corporation Counsel

FROM: J. Walter Lund
Associate Director

SUBJECT: Professional Tax Refund

Per your request of June 17, 1982, information concerning professional tax refunds as of June 24, 1982 is as follows:

I. *Amount of claims and refunds paid, by year:*

TAX YEAR	NUMBER OF CLAIMS	DOLLARS
1975	1035	$ 4,044,823.57
1976	1290	5,488,567.29
1977	1884	6,333,133.34
1978	1860	7,380,758.81
1979	1197	6,029,550.39
1980	238	1,002,587.44
1981	13	17,705.82
	7517	$30,247,126.66

II. *Number of taxpayers (claims who failed to file, by year:*

TAX YEAR	NUMBER OF CLAIMS	DOLLARS (*Estimated)
1975	99	$ 25,245.00
1976	506	68,101.00
1977	429	113,146.00
1978	407	92,895.00
1979	110	13,728.00
1980	-0-	-0-
	1551	$ 313,115

III. *Number of taxpayers (claims who filed too late, by year:*

TAX YEAR	NUMBER OF CLAIMS	DOLLARS**
1975	444	$ 459,784.00
1976	716	1,034,459.00
	1160	$1,494,243.00

* Based on known businesses. Estimate based on judgment of income to be attributed to D.C. residents. These figures do not include potential claims from other firms or individuals.

** Includes interest computed to June 1, 1982.

If you have any questions on this material, please call me.

JWL/rap

cc: Carolyn L. Smith

APPENDIX H

CLAIM FOR REFUND OF DISTRICT OF COLUMBIA UNINCORPORATED BUSINESS TAX

To: GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Finance and Revenue
Tax Audit and Liability Division
300 Indiana Avenue, N.W.
Washington, D.C. 20001

1. *Introduction.* By petition filed in the Tax Division of the Superior Court of the District of Columbia April 5, 1976, petitioner Axel-Felix H. Kleiboemer, appealed the denial of his claim for refund of amounts paid pursuant to the District of Columbia Unincorporated Business Tax, 47 D.C. Code § 1574, *et seq.*, on behalf of himself and all members of the class of similarly situated taxpayers. By order entered October 17, 1977, Judge John Garrett Penn directed that the case would be maintained as a class action. By subsequent order entered October 27, 1977, Judge Penn directed that all members of the class were entitled to refund of amounts paid pursuant to the tax for the period January 1 through November 30, 1975, provided the members of the class complied with the provisions of 47 D.C. Code 1586j.

2. *Identification of Taxpayers.* This claim for refund is made on behalf of all non-residents who are subject to the District of Columbia Unincorporated Business Tax by virtue of owning and engaging in the conduct of unincorporated personal service businesses in the District of Columbia and who have paid the tax, except for Richard A. Bishop (see Tax Docket No. 2362). See orders of Judge Penn dated October 17, 1977, October 18, 1977, and October 27, 1977, attached.

3. *Amounts to Be Refunded.* All amounts paid by the class of taxpayers identified above pursuant to the D.C.

Unincorporated Business Tax, 47 D.C. Code 1574, *et seq.*, from January 1, 1975, to and including the date of filing of this claim for refund, and appropriate interest.

4. *Kind of Tax.* The D.C. Unincorporated Business Tax, 47 D.C. Code 1574, *et seq.*

5. *Grounds for Claim for Refund.*

A. As to all amounts paid for the period January 1, 1975, through November 30, 1975: the tax is illegal because it unconstitutionally discriminates between calendar year and certain fiscal year taxpayers, as per Memorandum Order of Judge Penn dated October 27, 1977.

B. As to all amounts paid for the periods from January 1, 1975, through the date of filing of this claim for refund:

(1) The tax is prohibited by 1 D.C. Code 147(a)(5), (1973 ed., Supp. V, 1978);

(2) The tax denies these taxpayers due process and equal protection of the laws as guaranteed by the United States Constitution; and

(3) The tax was enacted without "adequate public notification" as required by 1 D.C. Code 144(c) (1973 ed., Supp. V, 1978).

/s/

Co-Counsel for Petitioner Kleiboemer and the class designated by orders of Judge Penn dated October 17, 1977, and October 27, 1977, *Kleiboemer* v. *District of Columbia*, Tax Docket No. 2379.

83-926

Office - Supreme Court, U.S
FILED
JAN 23 1984
ALEXANDER L. STEVAS,
CLERK

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-296

AXEL-FELIX KLEIBOEMER, ET AL., *Petitioners,*

v.

THE DISTRICT OF COLUMBIA, *Respondent.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

INEZ SMITH REID,
Corporation Counsel, D.C.

CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.

RICHARD L. AGUGLIA,
Assistant Corporation Counsel, D.C.
Chief, Finance Section
Counsel of Record for Respondent

District Building
Washington, D.C. 20004

QUESTIONS PRESENTED

(1) Whether petitioner raised below the principal argument in his petition, namely, that requiring class members to comply with a local claim-filing requirement in order to recover local taxes erroneously imposed deprived them of a vested property right?

(2) Whether the ruling below, requiring a claimant to file an individual refund claim in order to obtain a tax refund, offends the Due Process Clause of the Constitution of the United States?

(3) Whether it is appropriate for this Court to review a local law question of whether, and in what circumstances, the requirement of filing individual claims for refunds of local taxes might be tolled?

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APPENDIX

A. Opinion and Order of the Trial Court, dated September 24, 1981 (A1-A21).

B. Title Page, Table of Contents and Table of Citations of Petitoner's brief in the Trial Court (B1-B3).

C. The Due Process argument made by petitioner in the District of Columbia Court of Appeals (C1-C4).

D. Consent Judgement of the Trial Court, dated October 22, 1980 (D1-D5).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-296

AXEL-FELIX KLEIBOEMER, ET AL., *Petitioners,*

v.

THE DISTRICT OF COLUMBIA, *Respondent.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In 1975, respondent (hereinafter "the District") imposed for the first time a tax on the business income of professionals, whether trading as an unincorporated business or as a professional corporation in the District of Columbia. D.C. Law 1-23, § 605 (D.C. Code 1973, § 47-1574 (Supp. V 1978). The tax was commonly referred to as the "professional" tax. On March 25, 1976, petitioner Kleiboemer paid the tax and simultaneously filed a timely individual claim for refund at the administrative level as required by statute (D.C. Code 1973, § 47-1586j*) as a prerequisite to suit. His claim for refund was denied by the District's Department of Finance and Revenue the next day. On April 5, 1976, petitioner filed a class action petition for refund of the entire professional tax in the Tax Division of the Superior Court of the District of Columbia. His suit was consolidated with a similar refund suit filed by Richard A. Bishop who has not joined in this petition. Hearings were held and, on October 18, 1977, the trial court denied petitioner's and Bishop's requests for refund and dismissed their petitions with prejudice. In a separate order entered on that same day, the trial court certified the case as a class action maintainable under Superior Court Rules 23(b)(1)(A) and 23 (b)(1)(B), except for Bishop.[1]

On October 27, 1977, the trial court, *sua sponte*, modified its October 18, 1977 order and ruled that petitoners were entitled to a refund of all professional taxes paid by them prior

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*References to the D.C. Code will be to the 1973 edition, the edition in use during the course of this case. The updated 1981 Code references are contained in the Index. Section 47-1586j requires, in essence, the filing of an individual claim for refund by the taxpayer, in writing and under oath, within three years of payment of the tax. The relevant language of Section 47-1586j is set forth at page 12, note 10, *infra*.

[1]Bishop was excluded at his own request from the class when it was certified.

December 1, 1975.[2] In awarding refunds, however, the Court required that:

> Any members of the class who were fiscal year taxpayers and *had perfected their claim for refund as provided by law,* would now be entitled to a refund or credit consistent with the above opinion . . . . (Memorandum Order of October 27, 1977 at 9; emphasis supplied, Pet. at 4, 5)

In a separate order, also entered on October 27, 1977, the trial court provided:

> ORDERED that the class consists of those nonresident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, Sec. 47-1574b (Supp. IV, 1977), except for Richard A. Bishop (See Tax Docket No. 2362), and it is further
>
> ORDERED that the petitioner, Axel-Felix Kleiboemer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further
>
> ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, *provided they have compiled with or comply with D.C. Code 1973, Sec. 47-1586j.* Cf., *D.C.* v. *Keyes,* 362 A.2d 729 (D.C. App. 1976) (Emphasis supplied; Petitoner's App. 24a-25a)

Petitioner (and Bishop) appealed the trial court's October 18, 1977 decision sustaining the validity of the professional

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[2]Although the trial court held the basic tax valid, it held that the District impermissibly discriminated against calendar year taxpayers in favor of fiscal year taxpayers in implementing the tax and that calendar year taxpayers were entitled to a refund of all taxes paid by them prior to December 1, 1975.

tax for tax years after 1975, but petitioner did not appeal the trial court's subsequent October 27, 1977 decision awarding refunds for 1975 provided class members ". . . had perfected their claim for refund as provided by law," that is, "complied with or comply with D.C. Code 1973, Sec. 47-1586j".

About one year later, on November 30, 1978, while the validity of the professional tax was on appeal to the District of Columbia Court of Appeals, petitioner filed with the trial court a motion for an order "compelling inclusion of notice *to members of the class*" of the expiring redemption period set forth in D.C. Code 1973, § 47-1586.[3] (Emphasis supplied) The proposed notice was to be included with tax returns being mailed to class members by the District in December, 1978. At hearing on the motion, counsel for petitioner stated that the October 27, 1977 ". . . judgment itself specifically contemplated that *the members of the class* comply with 1586(j) . . .". (Emphasis supplied)

On December 11, 1978, prior to the trial court's ruling on the motion to compel inclusion of notice to class members of the expiring three year redemption period, petitioner filed one claim for refund at the administrative level on behalf of all non-residents subject to the professional tax and who had paid the tax. On December 26, 1978, the District's Department of Finance and Revenue denied petitioner's class claim for refund. On December 20, 1978, petitioner filed a class claim for refund with the trial court. On January 3, 1979, the trial court declared the class claim for refund null and void since it

> . . . does not comply with the requirements of D.C. Code 1973 § 47-1586j and with this Court's [unappealed] order of October 27, 1977.

The trial court did hold that individual notice had to be given to the class members of the statutory requirement to file a

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[3] The District of Columbia Court of Appeals permitted a remand of the record for consideration of this motion.

claim for refund, not only regarding 1975, but also 1976 through 1978. The District's Department of Finance and Revenue issued the individual notices in December, 1978 along with tax returns.

On appeal, the District of Columbia Court of Appeals *en banc* held invalid the professional tax. *Bishop* v. *District of Columbia*, 411 A.2d 997 (1980). Following this Court's denial of the District's petition for a writ of *certiorari* (446 U.S. at 966), the Court of Appeals mandate was returned to the Superior Court on May 29, 1980. On October 22, 1980, the trial court entered a consent judgment directing refunds to class members who had paid the tax and had also filed timely and individual claims for refunds pursuant to D.C. Code 1973, § 47-1586(j).

That consent judgment reserved for subsequent decision the issue raised here by petitioner, that is, the necessity of individual and timely refund claims pursuant to statute. Pursuant to the consent judgment, the District refunded approximately $32,250,000, including interest and attorneys fees, or 94% of the tax collected to 7,517 taxpayers who submitted individual and timely claims for refund (Pet's. App. 29a-30a). The consent judgment also provided for the mailing of a claim form to all known non-resident professional who had paid the tax.

On September 24, 1981, the trial court (Fauntleroy, J.) reaffirmed the prior ruling (Penn, J.) that "the timely filing of individual claims at the administrative level by affected taxpayers is a prerequisite to refunds in this suit . . .".[4]

On appeal, the District of Columbia Court of Appeals affirmed in two separate decisions, holding:

> The tax was not initially held lawful until a year and one-half after it came due and that decision was promptly appealed, so that taxpayers might have

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[4]See Respondent's Appendix "A", attached to this Opposition.

pursued their administrative remedies with some hope of success.

Extensive notice of the claim requirement was given in the media, in business and professional publications, by mail, and in seminars.

The trial court expressly held this notice to be sufficient.

No appeal was taken from the October 27 order first giving petitioners notice that individual claims were required (and petitioners appeared to understand that the October 27 order did require individual claims). (Pet.'s App. 17a-18a; footnote omitted; emphasis supplied)

This petition for a writ of *certiorari* to review the decisions of the District of Columbia Court of Appeals followed on December 5, 1983.

REASONS FOR DENYING THE WRIT

I. Petitioner did not raise below the principal argument in his petition, namely, that requiring class members to comply with a local claim-filing requirement in order to recover local taxes erroneously imposed deprives them of a vested property right.

It is well established that this Court will not ordinarily consider questions that have not been raised and briefed below. See, e.g., *California* v. *Taylor*, 353 U.S. 553, 557, n.2 (1957). Furthermore, in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85, n.9 (1980), this Court stated:

> It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, "[n]o particular form of words or phrases is essential, but only that *the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.* And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmer-*

man, 278 U.S. 63 at 67, 73 L.Ed. 184, 49 S.Ct. 61, 62 ALR 785. (Emphasis supplied)

The principal argument in the petition here (Petition, pp. 9-10) was not presented at all to the courts below.

In so far as we understand it, petitioner's principal argument in favor of a grant of *certiorari* (Petition at 9-10) is that any requirement that class members comply with the applicable claim-filing procedures to obtain refunds of taxes erroneously imposed deprives them of due process of law because it divests them of a vested right. That right is apparently the "right" to be "exempted . . . from the commuter [professional] tax . . . ." (*Id.* at 10). Petitioner relies on *Ward* v. *Bd. of Commissioners Love County*, 253 U.S. 17 (1920); *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Bd. County Commissioners* v. *Seber*, 130 F.2d 663 (1942), *affd.* 318 U.S. 705 (1943). No such argument was ever made to either of the courts below.

In the trial court, petitioner made no due process argument at all.[5] As argued in the petition (p. 8), petitioner did make a due process argument in the District of Columbia Court of Appeals. But the argument he made there is very different from the principal argument he now advances in his petition to this Court.[6]

In the Court of Appeals, petitioner argued that class members were being denied due process principally because, as the trial court defined the class, the entire class would be bound by a decision adverse to it (that is, a decision that the tax challenged was valid); however, because of the court's ruling that each class member must file a timely claim to obtain refunds, if the class prevailed, all class members would not realize the fruits of the victory (See Appendix "C" hereto

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[5] We have attached as Appendix "B" to this Opposition, the title page, table of contents, and table of citations of petitioner's brief in the trial court.

[6] We have attached to this Opposition as Appendix "C" the due process argument petitioner made in the District of Columbia Court of Appeals.

at pp. C-1 - C-4). Petitioner also argued, in essence, that it was fundamentally unfair for class members to have to decide whether to file claims prior to knowing that the Court of Appeals would hold the tax invalid (*Id.* at p. C-3), and because, despite the District Government's efforts, some class members did not receive written notice of the need to file a claim for refund prior to the expiration of the time in which they were required to do so (*Id.* at p. C-3). Petitioner made no mention of any purported "vested right" to be immune from a commuter or professional tax; did not argue that the requirement of filing administrative claims for a tax erroneously imposed constituted a *per se* violation of due process; and did not cite any of the decisions it now relies upon in its principal argument.

There is no question that the principal due process argument advanced in the petition was not made to the courts below with the "fair precision" required by *Pruneyard Shopping Center* v. *Robins, supra,* and *New york ex rel Bryant* v. *Zimmerman, supra.* Thus the Court of Appeals understood their due process argument as follows:

> Petitioners contend as well that the division opinion failed to address their argument that *members of the class, having been bound by the trial court judgment adverse to them* until this court reversed it (after the stautory period for claims expired), *would be denied due process if they were denied the benefits of this Court's final judgment holding the tax illegal. This argument was made in less than 3 pages of a 49-page brief. No cases were cited* in direct support of the argument, *and it was essentially urged that it would be extremely harsh and fundamentally unfair to reach the result the division did reach.* (Pet.'s App. 20a; emphasis supplied).

Since petitioner did not provide the courts below with an opportunity to address the argument they now advance, this Court clearly should not undertake to review the decision below on that ground.[7]

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[7]Even if it were appropriate for this Court to consider the question, review would properly be denied because petitioner's argument is frivolous. The Court

[Footnote continued on next page]

II. The ruling below that, in order to obtain a tax refund, a claimant must file an individual refund claim, does not offend the Due Process Clause of the Constitution of the United States.

Petitioner argues that the decision below offends due process for essentially two reasons: (1) Some individual taxpayers did not receive actual notice that they were required to file a claim for refund prior to the expiration of the period for doing so (Pet., p. 15), and (2) "[d]ue process and fundamental fairness require that because all class members were bound by the trial court's judgment, respondent must be bound by the trial court's judgment." (*Id.*).[8] Neither of these arguments has the slightest merit.

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[7] continued from preceding page

has long held that requiring resort to an administrative body as a precondition to securing a tax refund does not violate due process. *Dodge* v. *Osborne*, 240 U.S. 118, 122 (1916). *Cf.* also *Bob Jones University* v. *Simon*, 416 U.S. 725, 748-750 (1973). Furthermore, the Court has specifically held that resort to state administrative procedures is required to challenge the validity of a tax, even were the tax is alleged to violate the federal constitution. *California* v. *Grace Bretheren Church*, 457 U.S. 393, 407-413 (1981). See also *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981) (Taxpayers cannot challenge allegedly unconstitutional administration of state tax system under 42 USC §1983, but "must seek protection of their federal rights by state remedies . . . ."). These decisions preclude petitioner's argument that requiring administrative resort as a precondition of obtaining a refund of an invalid tax constitutes a denial of due process *per se*.

[8] Petitioner also argues that the individual claim requirement must be assessed in light of the factors outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), namely, the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Pet. at 11-14). The flaw in the argument, however, is apparent from *Mathews* itself, which involved a requirement that individuals file claims as a precondition to seeking the relief in question. The Court made it clear that an individual claim requirement did not have to be analyzed with respect to the enumerated factors by holding that compliance was required with the claim requirement wholly apart from its factor analysis. (424 U.S. at 326-322).

As the Court of Appeals found, (Pet.'s App. 3a), the District of Columbia Government provided individual notice of the claim filing requirement

> in the District's mailing of 1978 tax return forms. However, some erstwhile members of the class did not actually receive the mailing, because they no longer operated unincorporated businesses in the District and hence were no longer obligated to file a return. Accordingly, the court in March 1979 directed the District to issue a press release to publicize the need by those who paid the tax for 1975 to file a return claim by April 15, 1979. On April 5, 1979, the court held that sufficient notice had been given to the class members regarding the administrative claim requirement. (Record at 138.)

The Court of Appeals further noted:

> During the period of litigation, extensive efforts were exerted by mail and by publication, to inform taxpayers of the need to file a claim; and the trial court expressly held such notice to be sufficient. (Pet's. App. 7a)

Claims were filed for refunds of almost $32,250,000 which represents about 94% of the total tax collected. (Pet.'s App. 29a-30a; the refunds actually paid ($30,247,126) had been decreased by $2,000,000 for attorneys fees to counsel for petitioner. See Resp.'s Appendix "D" at 2.

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), cited by petitioner (petition at 15), does not require individual notice to each potential claimant, but only "the best notice practicable." *Id.* at 314. Both courts below found that the District Government's efforts satisfied that standard. Accordingly, review by the Court would only be appropriate if petitioner made "a very obvious and exceptional show of error." *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S.

630, 635 (1967). Petitioner has presented nothing to show that these rulings are incorrect.[9]

Petitioner's argument that class members were denied due process because the class and the District Government were not equally bound by the rulings below (Petition at 15) is similarly flawed. It ignores the fact that the trial court made two different rulings; one on liability (concerning the validity of the tax) and one on remedy (concerning eligibility for refunds). The fact that the class prevailed on the first did not entail that the entire class would prevail on the second, as petitioner posits. *Cf., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977) (Recognizing that questions of liability and remedy are distinct, and that a favorable ruling on liability does not automatically require that the entire class involved receive relief). Therefore, the fact that the class prevailed on the liability issue, but not on the remedy question, does not establish any fundamental unfairness.

III. It would be inappropriate for this Court to review the local law question of whether, and in what circumstances, the requirement of filing individual claims for refunds of local taxes might be tolled.

The District of Columbia Court of Appeals rejected petitioner's argument that a single claim should toll the claim-filing requirement issue here for essentially two reasons.

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[9]Petitioner asserts

> The District had a list of taxpayers that included the names and addresses of those individuals who did not receive the December 1978 notice; however, respondent chose not to notify these individuals by mail. (Pet., p. 6)

There is no support in the record for these assertions, and they are untrue. Petitioner apparently infers that, because the District was able to estimate the number of taxpayers who failed to file claims within the requested time period (See Pet.'s App. 30a), the District knew, before claims were due, who had not received notice. The inference is not reasonable: one cannot tell who will not file within a period until the period has expired. As stated, it is also incorrect.

First, the court looked to whether such tolling would be consistent with the specific language of this particular provision and the policy consideration underlying it. The court found that tolling would be inconsistent with "one of the important purposes served by the three-year filing deadline for tax refund claims" namely, "to protect the District against financial instability by setting a date certain by which the District may know the precise extent of its liability for refunds." (Pet.'s App. at 8a.) The court further believed that the language of the provision, which requires a claim for refund to be filed "by the taxpayer" also militated against such tolling. (Pet.'s App. at 1a.)[10] Second, the court reasoned that, even if the tolling principle which this Court has found applicable in different federal contexts was equally

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[10]The statute in question here, D.C. Code § 47-1586j (1973) provides in pertinent part:

> (a) Refund to taxpayer.—
>
> . . . where there has been an overpayment of any tax imposed by this subchapter, the amount of such overpayment may be credited against any liability in respect to any income or franchise tax or installment thereof (whether such tax was assessed as a deficiency or otherwise), on the part of the person who made the overpayment, and the balance shall be refunded to such person.
>
> *No such credit or refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer,* and no tax or part thereof which the Assessor may determine to have been an overpayment shall be refunded after the period prescribed therefore in the Act appropriating the funds from which such refund would otherwise be made. The amount of such credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of such credit or refund. *Every claim for credit or refund must be in writing, under oath; must state the specific grounds upon which the claim is founded, and must be filed with the Assessor.* (Emphasis supplied.)

applicable to the local statute here, tolling would be inappropriate in the particular circumstances of this case, because the class members here did not "promptly move [ ] . . . to protect [their] interests." (Pet. App. at 9a, n.7 citing and quoting *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). Specifically, the court found that, when the trial court ruled that only those class members who complied with the claim-filing requirement would be eligible to recover refunds, the class representatives did not appeal that ruling, even though the import of the ruling was plain and the class representatives clearly understood that individual compliance was required . (Pet.'s App. at 19a-20a.)

Despite the fact that the Court of Appeals' ruling is based both on the specific purposes and language of the particular statute involved here, and on the peculiar circumstances of this case, petitioner claims that his "claim to equitable tolling . . . raises an issue of great significance that is a matter of general nationwide applicability." (Pet. at 16, n. 7). That assertion is patently baseless.

As petitioner recognizes (*id.*), this Court will not review decisions of the Court of Appeals of the District of Columbia on local law questions "save in exceptional circumstance where egregious error has been committed." *Pernell* v. *Southall Realty*, 416 U.S. 363, 369 (1974), citing *Fisher* v. *United States*, 328 U.S. 463, 476 (1946). Petitioner apparently assumes that there is a particular federal interest of exceptional importance in having local courts apply the same tolling rules to local law issues that the Court has applied under federal statutes. That assumption is plainly incorrect. For, even where federal claims are involved, this Court has held that local, rather than federal, tolling rules may appropriately be applied. *Chardon* v. *Soto*, 103 S.C. 2611(1983). Accordingly, there can be no overriding federal interest in requiring that the tolling rules evolved in federal contexts be applied to purely local law questions.

Moreover,even if federal tolling principles were properly applied in the local law context here, petitioner has not shown that "egregious error" was committed. The Court of Appeals took great care to show how petitioner, in his representative capacity, did not move to protect class members' interests even after he knew they had been adversely affected. Petitioner does not even attempt to show that this was error under *United Airlines* v. *McDonald, supra,* and its precedessors, much less egregious error. Accordingly, petitioner has not shown that the exercise of this Court's *certiorari* jurisdiction is appropriate here.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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APPENDIX "A"

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

ORDER

It is hereby:

ORDERED that the timely filing of individual claims at the administrative level by affected taxpayers is a prerequisite to refunds in this suit, and it is further

ORDERED that the District of Columbia shall compute interest at 4% on the refunds from the date such individual claims are timely filed until the date of the making of the refund.

/s/ John D. Fauntleroy
JOHN D. FAUNTLEROY
Judge

September 24, 1981

cc: Philip L. Kellogg, Esq.
Bradley G. McDonald, Esq.
John M. Bixler, Esq.
Ronald D. Aucutt, Esq.
Richard L. Aguglia, Esq.
Carolyn L. Smith, Director
Department of Finance
and Revenue

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

On October 20, 1980, the parties presented to this Court a proposed consent judgment which set forth the following three (3) unresolved issues in this case:

1. Whether a taxpayer who has failed to file a claim for refund under D.C. Code §47-1586j within three years from the time the tax was paid is entitled to receive a refund of the tax paid or, alternatively, whether the filing herein by the petitioner Axel-Kleiboemer of his individual claim for refund, his claim for refund filed for the class, and his class action petition constituted the timely filing of a claim or the timely filing of a petition by the members of the class.

2. Whether a taxpayer is entitled to receive a refund of tax paid for a year or years for which the statute of limita-

tions has not run if he fails to file a claim for refund under D.C. Code §47-1586j.

3. When interest as provided by law begins to run.

The judgment order, with some slight modifications not here relevant, was signed on October 22, 1980, and argument on these three issues was set for December of 1980. Briefs were filed, pursuant to the terms of the October 22, 1980 judgment order, with short extensions to both parties. After consideration of the arguments and briefs of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

THE CLAIM FOR REFUND ISSUE

On March 25, 1976, petitioner Kleiboemer, the class representative in this suit,[1] paid the tax here in dispute and simultaneously filed an individual claim for refund at the administrative level as required by statute as a prerequisite to suit. That claim for refund was denied on March 26, 1976 by the Department of Finance and Revenue. On April 5, 1976, petitioner Kleiboemer filed a class action petition for refund of tax in the Tax Division of this court.

On October 18, 1977, the Tax Division of this Court denied the request of petitioners Bishop and Kleiboemer for refund in this case and dismissed their petitions with prejudice. In a separate Order entered on that same day, the Tax Division certified this case as a class action maintainable under Superior Court Civil Rules 23(b)(1)(A) and 23(b)(1)(B), except for petitioner Bishop. On October 27, 1977, the Tax Division, *sua sponte,* modified its October 18, 1977 opinion and

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[1] Petitioner Bishop was excluded at his own request from the class when it was certified.

ruled that petitioners were entitled to a refund of all franchise taxes paid by them prior to December 1, 1975. The Court went on to state:

> Any members of the class who were fiscal year taxpayers and *has perfected their claim for refund as provided by law,* would now be entitled to a refund or credit consistent with the above [opinion]. . . .
>
> ORDERED that the class consists of those nonresident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, sec. 47-1574b (Supp. VI, 1977), except for Richard A. Bishop (See Tax Docket No. 2362), and it is further
>
> ORDERED that the petitioner, Axel-Felix Kleiboemer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further
>
> ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, *Provided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j. [Cf., D.C. v. Keyes, 362 A.2d 729 (D.C.App. 1976)]* (Emphasis supplied; 105 W.L.R. 2013, 2019.)

Both decisions were appealed.

On November 30, 1978, while these two decisions were bi-ing considered on appeal (App. Docket Nos. 12871, 12872, 12920 and 12921), petitioners filed with the Tax Division a motion for an order "compelling inclusion of notice to members of the class'" of the expiring redemption period set forth in D.C. Code §47-1586j in the District's December, 1978 mailing to class members. Petitioners went on to state in that motion that:

> By order dated October 27, 1977, this Court directed the refund of all taxes paid by members of the class . . . for the period January 1 through

> November 30, 1975, *provided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j . . . 47-1586j requires all claims for refund to be filed within three years of the payment of the tax sought to be refunded.*
>
> In order to protect fully the rights of the members of the class, counsel are of the view that notice must be given to the class in a timely fashion to permit the filing of the necessary claims for refund. (Emphasis supplied; Motion at 1, 2.)

Subsequently, on December 12, 1978, and prior to the mailing of the requested notice to the class members, petitioner Kleiboemer filed one claim for refund at the administrative level on behalf of "*all* non-residents who are subject to the District of Columbia Unincorporated Business Tax by virtue of owning and engaging in the conduct of unincorporated personal service businesses in the District of Columbia and who have paid for the tax, except for Richard A. Bishop." (Emphasis supplied.) Thus, some two and one-half years after bringing suit, petitioner Kleiboemer, as the class representative, filed a class claim for refund at the administrative level. As stated above, prior to bringing this suit only an *individual* claim was filed by petitioner Kleiboemer on his own behalf at the administrative level. The classs claim for refund was rejected at the administrative level and respondent opposed the filing of that claim on behalf of the entire class at the trial level as contrary to the statutory requirement (§47-1586j) of individual claims. On the same date, respondent questioned the trial court's jurisdicton to hear and determine petitioner's motion, given the fact that its October 18 and 27, 1977 rulings efffectively disposed of all the issues at the trial level which were then currently on appeal.

On December 13, 1978, the District of Columbia Court of Appeals granted petitioners-appellants unopposed motion to remand the record (but not the merits of the case-in-chief),

so that the trial court could consider their motion to compel inclusion of a notice of the expiring limitations period to members of the class in the District's December, 1978 mailing.

On January 3, 1979, the Tax Division entered and Order pursuant to its oral ruling and declared null and void the class claim for refund as contrary to §47-1586j. The trial court did, however, find appropriate individual notice to the members of the class of the statutory requirement to file a claim for refund not only regarding tax year 1975, *but tax years 1976 through 1978 as well.*

On January 19, 1979, petitioner Kleiboemer filed a notice of appeal from the Tax Division's rejection of his class claim for refund (App. Docket No. 79-123). Subsequently, petitioner asked the Court of Appeals to defer the filing of any further appellate pleadings on this issue until after final determination of the case-in-chief (i.e., the validity of the tax itself) had been made. Appellee-respondent opposed that motion and moved to dismiss the appeal as premature, since the trial court, on remand of the record, had yet to make a final determination of a remaining notice issue not germane to these proceedings. Action by the Court of Appeals on the District's motion to dismiss was stayed pending a final determination by the trial court of all remaining issues.

On March 15, 1979, the trial court decided all remaining issues on remand of the record and petitioners filed a second appeal (App. Docket No. 79-574), which was consolidated with the first (App. Docket No. 79-123) for all purposes by the Court of Appeals on June 26, 1979. The Court of Appeals further stayed any action on those motions pending a final determination on the merits of the validity of the tax.

On February 12, 1980, the District of Columbia Court of Appeals, sitting *en banc,* reversed the judgment of the Tax Division and held that the tax in issue violated the proscription of a commuter tax as set forth in section 602(a) (5) of the Self-Government and Governmental Reorganization Act

(D.C. Code 1973, §1-147 a(5)(Supp. V, 1978). Its mandate was returned to the Tax Division on May 29, 1980 and, pursuant to that mandate, judgment for petitioners was entered by this Court on October 22, 1980. The terms of that judgment provided that, *inter alia*, the District notify affected taxpayers of the requirements for obtaining refunds, i.e., the filing of individual claims. With that notice, the District was required to supply and did supply a form entitled "Summary of Information Regarding Unincorporated Business Tax Refund", which would be treated by the District as a claim for refund form, if timely filed.

FINDINGS OF FACT

II

THE INTEREST ISSUE

This Court adopts the findings of fact contained above and determines that the question of when interest must be paid by the District of Columbia on overpayments claimed by taxpayers is governed by the relevant District of Columbia Code citation, 1973 ed., §47-2413 (c), which provides for the award of interest on overpayments of tax reads as follows:

> (c) Any other provision of law to the contrary notwithstanding, if it is determined by the Commissioner or by the Superior Court that there has been an overpayment of any tax, whether as a deficiency or otherwise, interest shall be allowed and paid on the overpayment at the rate of 4 per centum per annum from the date the overpayment was paid until the date of refund, *but with respect to that part of any overpayment which was not assessed and paid as a deficiency or as additional tax interest shall be allowed and paid only from the date of filing a claim for refund* or a petition to the Superior Court as the case may be. (Emphasis supplied.)

CONCLUSIONS OF LAW

I

THE CLAIM FOR REFUND ISSUE

The Tax Division (Penn, J.) held invalid the District's imposition of the unincorporated business tax for the first eleven (11) months of 1975. The trial court made it perfectly clear, however, that individual claims for refund within the meaning of §47-1586j were necessary. It, therefore, rejected petitioner Kleiboemer's class claim for refund for the 1975 taxable year. Aware of the expiring statute of limitations for other years in which taxes were paid pending resolution of the validity of the tax by the Court of Appeals, *the trial court also rejected petitioner's class claim for refunds for 1976 through 1978.* In this regard the trial court stated that the class members should be individually notified (and were) of "the statutory requirement to file a claim for refund . . . and . . . that such notice should include notice not only regarding tax year 1975, *but tax years 1976 through 1978 as well.*" (Order at 1, 2; Emphasis supplied.)

The Court's subsequent Order of January 3, 1980, when combined with those of October 18 and 27, 1977, leaves no doubt that the class here represented has been judicially defined as:

(1) non-resident professionals doing business in the District and subjected to tax since 1975,
(2) who have paid the tax, and
(3) *who have filed individual claims for refund under* §47-1586j,
(4) except for Richard A. Bishop.

This Court concludes, therefore, that Judge Penn has ruled that a timely administrative claim is a prerequisite to a refund of the tax paid, and as such, is the law of the case.

Even assuming Judge Penn had not already ruled that the filing of timely individual claims for refund was a predicate

to recovery, this Court, for the reasons that follow, would have so held:

The relevant District of Columbia stature, §47-1586j, 1973 ed. (Supp. VII, 1980), reads in part as follows:

> (a) Refund to taxpayer. —
>
> . . . . where there has been an overpayment of any tax imposed by this subchapter, *the amount of such overpayment* may be credited against any liability in respect of any income or franchise tax or installment thereof (whether such tax was assessed as a deficiency or otherwise), on the *part of the person who made the overpayment*, and the balance shall be refunded to such person.
>
> *No such credit or refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer, and no tax or part thereof which the Mayor may determine to have been an overpayment shall be refunded after the period prescribed therefor in the Act appropriating the funds from which such refund would otherwise be made.* The amount of such credit or refund shall not exceed the portion of then tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of such credit or refund. *Every claim for credit or refund must be in writing, under oath; must state the specific grounds upon which the claim is founded, and must be filed with the Mayor.* (Emphasis Supplied.)

The words emphasized in the above Section by respondent have remained virtually unchanged[2] since Everett Dirksen referred Bill H.R. 2282[3] to the committee on the District of Columbia on February 27, 1947. The purpose of the statute is clear — to limit refunds on overpayments to named persons in amounts specified in writing within a certain time frame for budgetary purposes. Thus, unless a taxpayer

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2 The word "Mayor" has been inserted in place of the word "Assessor".

3 H.R. 3737 (80th Cong., 1st Sess., 1947) was the bill actually reported out.

claims in writing that a specified amount of tax has been overpaid, more than three years from payment, no refund will be allowed. In this way, the District of Columbia, through the Congress of the United States, may forecast and plan for its fiscal obligations and comply with Charter requirements that the District's budget must be balanced and the District cannot expend funds in excess of its revenues. Self-Government Act §442(a)(1), 448, and 603(c). This conclusion is bolstered by the language of the statute itself:

> . . . and *no* tax or part thereof which the Mayor may determine to have been an overpayment shall be refunded after the period prescribed therefore *in the Act appropriating the funds from which such refund would otherwiser be made.*

Moreover, Judge Penn provided for individual notice to these taxpayers (in the District's December 1978 mailing, as stated above) of the requirement to file separate claims for refund for the taxable years 1975-1978. At the time of that mailing, the applicable statute of limitations had not run on any year involved in these proceedings.

Further, the notice attached to this Court's judgment order of October 22, 1980, was required by that very order to be mailed to all affected taxpayers. The notice informed taxpayers of their right to complete an enclosed form to be treated by the District as a timely refund claim for all open years. At the time of the mailing, 1977, 1978, 1979 and 1980 were all years for which the applicable statute of limitations had not run.

The Court is also cognizant of the fact that further notice of the requirement to file individual claims for refund for 1975 (and a suggestion to file for all years) appeared in the *District Lawyer,* Feb. 1978, Vol. 2, No. 3 at 57-58 and in several newspaper articles. See, for example, page B-2 of the April 5, 1979 edition of the Washington Post.

It is, therefore, difficult to perceive how the taxpayers have been injured by the requirements of individual claims for refunds.

The requirement of an individual claim for refund is supported by the case of *District of Columbia* v. *Keyes*, 362 A.2d 729 (D.C. App. 1976). In that case, Arthur and Lucille *Keyes, on behalf of themselves and others similarly situated,*[4] brought suit against the District for partial refunds paid in fiscal year 1973 on all single-family residential properties in the District of Columbia which were assessed at 60% of estimated market value. The trial court awarded the refunds sought. In reversing, the appellate court noted that the refund of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and was a matter within the purview of the legislative branch. The Court further found that under the statutory procedure applicable to the case, the recovery of refunds through appeal to the Superior Court first required (as here), a complaint to the proper administrative body. Since the taxpayers failed to follow their administrative remedies for fiscal year 1973, refunds were disallowed. The Court of Appeals in *Keyes*, aware of the precedential effect of its decision for future class action tax refund cases,[5] also disallowed refunds under a separate theory. The Court went on to state:

> While application of the principles of equity occasionally may be appropriate in tax litigation (e.g., Green) *it would hardly aid the financial stability of this city if this court were to relax the statutory requirements of our Code as they relate to tax litigation and superimpose equity jurisprudence on these statutory requirements.* This should be done only in a rare case (e.g., Green). *Otherwise, financial instability would be promoted.* Tax statutes are necessarily formalistic and often technical. *It is essential that we adhere to their technicalities,* even

[4] The action was brought as an uncertified class action.

[5] 362 A.2d at 736.

> if at times a seeming hardship results to the taxpayer. See, e.g., *George Hyman Construction Co.* v. *District of Columbia*, D.C.App., 315 A.2d 175, 178 (1974). *Among other things, fiscal considerations require that this be done.* Where class action tax refunds for fiscal years in the past are at issue, the relief sought would not emanate from some inexhaustible treasury. The reality is that the funds could only be supplied by an additional tax on innocent taxpayers, or the reduction of services, in an already financially beleaguered city. Only in extraordinary circumstances, not here peresent, should the equity relief sought be afforded. (Footnote omitted; Emphasis supplied; 362 A.2d at 737.)

The result of the *Keyes* case rest on many of the same grounds advanced by the District here.[6]

The following cases are examples of numerous cases which support the position that a strict construction of exclusive statutory remedies for tax refunds is required:[7] *Jones* v. *Liberty Glass Co.*, 332 U.S. 524 (1947); *Rosenman* v. *U.S.*, 323 U.S., 658 (1945) (claims for tax refunds must conform strictly to the requirements of Congress); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 342 (1937) (if the administrative remedy is fair and adequate, other questions need not be considered, and the substitution of an exclusive remedy directly against the Government is not an invasion of constructional right); *Marboefer Pkg. Co., Inc.* v. *Indiana Department of State Revenue*, 301 N.E. 2d 209 (1973) (where the legislature has by statute created a right, afforded a remedy and prescribed a procedure to be followed in connection with the remedy, that procedure must be strictly followed).

The following cases lend support for the position that a *class* claim for refund at the administrative level (under §47-1586j) is not maintainable.

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[6] The *Keyes* rationale has been followed by the trial court in *Calvin Humphrey & River Park* v. *D.C.*, Tax Division Docket No. 2221.

[7] It is conceded that these particular cases, unlike Keyes do not involve class action suits.

In *Rose* v. *American Airlines, Inc.*, 331 F.Supp. 72 (N.D. Ill., 1971), plaintiffs brought a class action suit challenging the constitutionality of the Airport and Airway Revenue Act of 1970. The Act imposed an 8 percent tax on domestic flights and a $3.00 ticket tax on international flights originating in the United States. Plaintiffs sought, *inter alia*, that the new airline rates be declared null and void and that the funds collected thereunder be refunded to the public.

The United States Government moved to dismiss the claim for refund brought on behalf of the class since only the named plaintiffs had filed individual claims for tax refund at the administrative level under 26 U.S.C. §7422(a). Section 7422(a) is similar to D.C. Code §47-1586j and reads as follows:

> SEC. 7422. CIVIL ACTIONS FOR REFUND.
>
> (a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND. — *No suit or proceeding shall be maintained* in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive of in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary*, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. (Emphasis supplied.)

In agreeing with the Government's contention in this regard, the Court stated:

> The recent case of *Agron* v. *Illinois Bell Telephone Co.*, 319 F.Supp. 418 (N.D. Ill. 1970) has held that sec. 7422(a) requires that before suit for refund can be filed in the federal cout a claim must have been duly filed with the Secretary *and that this requirement applies individually to all members of a class.* The court concurs with the holding in *Agron* and accordingly the claims of the class for refund are stricken for failure to comply with 26 U.S.C. §7422(a). (Emphasis supplied, 331 F.Supp. 79.)

In *Agron* v. *Illinois Bell Telephone Co.*, 325 F.Supp. 487 (N.D. Ill. 1970),[8] reversed on other grounds, 449 F.2d 906 (7th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972), plaintiff Agron brought a class action claim for refund of federal excise taxes on telephone service. Upon consideration of the parties cross motions to dismiss and for summary judgment, the District Court held that plaintiff subscribers could *not* maintain the action as a class action on behalf of other subscribers. In support of its decision and in terms strikingly similar to the facts of this case, the Court stated:

> While extensive and involved briefs have been submitted by all parties, the complete, if short, answer to the basic issue raised in Count II is that *plaintiff's class action for tax refunds may not be maintained. An action for the refund of federal taxes may only be commenced after an administrative claim has been filed and disallowed*, 26 U.S.C. §7422(a); *United States* v. *Wells Fargo Bank*, 393 F.2d 272, 273 9th Cir. 1968); *Mulcahy* v. *United States*, 388 F.2d 300, 302 (5th Cir. 1968; *England* v. *United States*, 261 F.2d 455, 456 (7th Cir. 1958). Plaintiff has not alleged that any, much less all, of the tens of thousands of claimants on whose behalf he allegedly brings this action have exhausted their available administrative remedies. *Plaintiff does allege that he filed an administrative tax refund claim on behalf of himself and all telephone subscribers similarly situated and that said claim was rejected.* Complaint 123, Ex. 4. *We find that attempt at satisfying the administrative prerequisites to this kind of civil suit to be unsatisfactory. By failing to name the claimants and the amounts due to each, plaintiff's claim on their behalf falls far short of the detail required by federal regulations.* 26 C.F.R. §301.6402-2* See *Herrington* v. *United States*, 416 F.2d 1029, 1031-1032 (10th Cir. 1969).
>
> *Essentially, an unauthorized agent may not "claim an unspecified refund for unknown principals."*

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[8] The correct citation to *Agron* is 325 F.Supp. 487 and not 319 F.Supp. 418 as stated by the Court in *Rose*.

> *Harkins* v. *United States*, 66-2 U.S.T.C. ¶9543, at 86, 702 (E.D. Okla. 1966), aff'd. on other grounds, 375 F.2d 239 (10th Cir. 1967). Consequently, the only party of whom we are aware that has standing to bring this action under 28 U.S.C. §1346(a)(1) is the named plaintiff, Agron, who, at best, may be said to constitute a class of one. *McConnell* v. *United States*, 295 F.Supp. 605, 606 (E.D. Tenn. 1969); *Lipset* v. *United States*, 37 F.R.D. 549, 551-552. (S.D.N.Y. 1965), appeal dismissed 359 F.2d 956 (2d Cir. 1966). (Emphasis and asterisk supplied; 325 F.Supp. 488.)

In *McConnell* v. *U.S.*, 295 F.Supp. 605 (E.D. Tenn. 1969), the individual claim requirement—financial stability—espoused by respondent here, is set forth as follows:

> Conceding arguendo that the plaintiffs and other striking employees of Kingsport Press, Inc. and their respective spouses may be members of the same class, before any taxpayer may maintain any action to recover *any* internal revenue tax alleged to have been erroneously or illegally assessed or collected, *it is an absolute and indispensible prerequisite that such taxpayer shall have filed a claim for refund or credit with the Secretary of the Treasury or his delegate*, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.
>
> *This serves to advise the appropriate internal revenue officials of the claims intended to be asserted by the taxpayer, so as to insure an orderly administration of the revenue. United States* v. *Felt & Tarrant Mfg. Co.* (1930), 283 U.S. 269, 272 51 S.Ct. 376, 75 L.Ed. 1025, 1027 [1]. "* * * It is vital to the functions of government that taxes be collected promptly and if errors are made, that they be expeditiously corrected. To this end the statute requires the taxpayer to make a timely charge of overpayment with grounds therefor, that the government may make investigation and refund the amount due, if any, wifthout being subjected to the delay and expense of litigation * * *." *Kales* v. *United States*, C.C.A. 6th (1940), 115 F.2d 497, 500, [3], [4], affirm-

> ed (1941), 314 U.S. 186, 193, 62 S.Ct. 214, 86 L.Ed. 132, 138. (Emphasis supplied, 295 F.Supp. 606).

See *Heisler* v. *U.S.*, 463 F.2d 375 (9th Cir. 1972); see also, *Henderson* v. *Carter*, 195 S.E.2d 4 (Ga. 1972) and *Hooks* v. *Comptroller of Treasury*, 289 A.2d 332 (Md. 1972), for similar state cases supporting respondent's position on this point. *Cf., U.S.* v. *Felt and Tarrant Manufacturing Co*, 283 U. S. 269 (1931) and *U.S.* v. *Rochelle*, 363 F.2d 225 (5th Cir. 1966).

The Court notes that petitioners have not cited a single case involving the refund of income or franchise taxes whereby the administrative process was successfully bypassed.

The legislative history of §47-1586j and its federal counterpart, 26 USC §7422(a), further support the District's position on this point. House Report No. 543 (80th Cong. 1st Session, 1947 at 4) on Title XII (in which §47-1586j is contained) of the 1947 Income and Franchise Tax Act for the District of Columbia reads as follows:

> Title XII contains the provision with respect to assessment and collection of taxes, time for payment of the same and certain other *administrative* provisions. (Emphasis supplied.)

The Senate Report (No. 28, 80th Cong. 1st Sess., 1947 at 4) is identical. Moreover, the legislative history of D.C. Code 1973, §47-2413(c), discussed, *post*, makes reference to the award of interest only from the date "on which the District is apprised of the fact that an overpayment is claimed to have been." Compliance with Section 1586j is the only applicable mechanism by which such notice can be given.

The cases interpreting Section 1586j's federal counterpart, 26 U.S.C. §7422(a) and its legislative history are unanimous in ruling that compliance with the statute—individual claims for refund even in class actions—are exclusive and an indispensable prerequisite to bringing suit. In addition to the cases cited above, many other courts have ruled that Section 7422(a) must be *strictly construed in favor of the Government.* See, for example, *Moser* v. *Wood*, 235 F.Supp. 547 (D. Ariz. 1964); *French* v. *Smyth*, 110 F.Supp. 795 (N.D.

Cal. 1952). One of the purposes of strict construction is to give the Government notice of pending claims and thus protect it from stale demands for refunds. See, for example, *Ryan* v. *Harrison*, 146 F.Supp. 671 (Ill. 1956). The exclusivity of the procedure has been upheld since its inception. See, for example, *Kent* v. *No Cal. Reg. Office of Am. Friends Service Committee*, 497 F.2d 1325 (9th Cir. 1974); *DuPont Glore Forgan, Inc.* v. *American Tel. and Tel. Co.* 428 F.2d 1297 (S.D.N.Y. 1977), aff'd 578 F.2d 1366, 1367, (2nd Cir. 1978) *cert. denied*, 99 S.Ct. 465 (1978).

In the *Dupont Glore Forgan* case, *supra*, the U.S. District Court once again rejected a class action claim for refund where all of the individual claimants had not followed the statutory procedure for filing refund claims. The Court went on to state:

> *Many members of the class plaintiffs represent have not filed refund claims,* and even those members of the class who have filed refund claims have not yet brought a refund suit against the government. *If the plaintiffs prevail,* and the defendants in turn are allowed to recover from the government as they seek to do by their third-party complaint, the plaintiff taxpayers will have succeeded in avoiding the strict procedural requirements for obtaining refunds. *In effect they will have obtained a refund of taxes from the government without giving the Internal Revenue Service an opportunity to consider their claims administratively,* and without being subject to the statutes of limitations imposed by the Code. *This would clearly negate the Congressional purpose in enacting the refund provisions of the Code.* (Footnote omitted; Emphasis supplied; 428 F.Supp. 1303.)

In conclusion, where the legislature has provided a right (the refund of taxes illegally or erroneously assessed and voluntarily paid)[9] where none previously existed, the procedure afforded to obtain that right must be strictly follow-

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[9] See *District of Columbia* v. *McFall*, 88 U.S.App.D.C. 217, 188 F.2d 999 (1951) and *Lindner* v. *District of Columbia*, D.C. Mun.App., 32 A.2d 540 (1943).

ed. The administrative remedy afforded by §47-1586j is fair and adequate and promotes fiscal stability. Moreover, petitioners have failed to demonstrate injury, since class members have received multiple and individual notice of the requirement to file administrative claims for the relevant tax years.

CONCLUSIONS OF LAW

II

THE INTEREST ISSUE

The clear and unambiguous language of §47-2413(c) awards interest on overpayments such as petitioner Kleiboemer *only* from the date of filing a claim for refund. Since petitioner Kleiboemer paid the disputed tax for 1975 and filed a claim for refund on the very same day, the issue is moot with respect to interest on his own particular refund for 1975. The Court's decision on this issue will, however, have a substantial effect on the amount of interest awarded class members who filed separate claims for refund near the statutory deadline (i.e., within three years after payment of the tax).

In support of their position on this issue, petitioners do not cite a single case (Brief at 13-17). Petitioners' argument is that "the traditional way interest is computed" is "from the date the overpayment was paid until the date of refund" (Brief at 14). This traditional rule, petitioners submit, is the federal rule and the rule in all 30 states that have a statute on the subject. Petitioners concede that:

> There is no American jurisdiction *except the District of Columbia* that withholds interest on overpayments of tax until a claim for refund is filed. (Brief at 15.)

It is important to note that the Congress of the United States, acting as a local legislature for the District of Columbia, enacted the interest statute which is codified at §47-2413(c). The same legislative body enacted §6611(b) of

the Internal Revenue Code, which provides for interest "in the case of a refund, from the date of the overpayment . . .", enacted §47-2413(c) which provides for interest on overpayments "*only* from the date of filing a claim for refund . . .". . (Emphasis supplied).

It is equally important to recognize that §§47-2413(c) and 47-1586j must be read in concert. Taken as a whole, these sections underscore the requirement of filing separete claims for refund from which date interest runs. For this court to hold that separate claims are not required by §47-1586j would vitate the meaning of §47-2413(c); if separate claims are unnecessary, then interest could only be computed by totally rewriting the interest statute. Thus, petitioners' argument that §47-1586j does not require individual claims cannot be squared with the method by which interest must be computed under the unambiguous terms of §47-2413(c).

Reference to the legislative history of §47-2413(c) strongly bolsters respondent's argument on this point.

Prior to the D.C. Court Reform Act of 1971 (P.L. 91-358), §47-2413(c) read in relevant part as follows:

> Provided, That with respect to that part of any overpayment which was not assessed and paid as a deficiency or as additional tax such *interest shall be allowed and paid only from the date of filing a claim for refund*, a petition to the Board, or a complaint with a court of competent jurisdiction, as the case may be. (Emphasis supplied; §47-2413(c) (1967 ed.))

For purposes of this case, the quoted language is the same as the present language in §47-2413(c). Thus, the critical language and requirements of §47-2413(c) have not changed since they were first enacted.

The purpose of the 1952 enactment was to provide a procedure for obtaining refunds of overpaid taxes where no such procedure prerviously existed. This was accomplishled by adding a new section (14) to title IX of the District of Co-

lumbia Revenue Act of 1937, consisting of five subsections. The relevant subsection to this issue (subsection (d) prior to 1970 and now codified as subsection (c)) was characterized in a House committee report (H.R. No. 1977, 82nd Cong. 2d Session 1952 as follows:

> (d) Provides for the payment of interest at the rate of 4 percent upon overpayments refunded, whether the refund is made administratively or by order of the Board of Tax Appeals or by order of court of competent jurisdiction, and whether the overpayment refunded resulted from an original payment of tax or from the payment of a deficiency assessment. A distinction is made, however *between overpayments resulting from original or voluntary payment of tax by a taxpayer and overpayments resulting from the assertion of a deficiency or additional tax by the District. As to the former type of overpayment, interest begins to run on the date on which the District is apprised of the fact that an overpayment is claimed to have been made.* If an overpayment is credited rather than abeing refunded to the taxpayer, the date of crediting is intended to be treated as the date of refund for purposes of computing interest, since the crediting of an overpayment wherre authorized is a constructive refund to the taxpayer.
>
> *This subsection (d) of the new section 14 is intended to apply to all overpayments of taxes, including income, franchise,* sales, and use taxes, and thus modifies existing law. (Emphasis supplied; Report at 4.)

To the same effect is S.R. No. 1471 (82nd Cong. 2d Session 1952; a copy of that report is attached as Resopndent's Exhibit No. 4). It is, therefore, beyond dispute that congress intended that interest would begin to run "on the date on which the overpayment is claimed to have been made . . .", i.e., the date of the filing of the individual claim for refund.

Petitioners argue that class "certification rendered it unnecessary—indeed, as we have shown effectively impossible—for individual class members to pursue their own remedies privately . . ." As stated above, Judge Penn ordered individual notice be given to all class members of the statutory requirement to file administrative claims for refund four (4) months in advance of the 1975 deadline and far in advance of the 1976-1978 deadlines. This was done. Thus, the private pursuit of those administrative remedies can most certainly be the measuring rod for the award of interest.

The award of intrerest at 4% from the timely filing of an administrative claim for refund is supported by the unambiguous words of the controlling statute and is supported by reference to its legislative history.

/s/ John D. Fauntleroy
JOHN D. FAUNTLEROY
JUDGE

September 24, 1981

APPENDIX "B"

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

PETITONERS' BRIEF REGARDING CLAIM FOR REFUND AND INTEREST ISSUES

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APPENDIX "C"

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-123, 79-547, 81-1232

RICHARD A. BISHOP
and
AXEL-FELIX KLEIBOEMER, *Petitioner-Appellants,*
v.
District of Columbia, *Respondent-Appellee.*

APPEALS FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, TAX DIVISION

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D. *Due Process and fundamental fairness demand that all class members, having been bound by the judgment against them, have the benefit of this court's reversal of that judgment and decision that the tax is unlawful.*

By reason of the class certification and definition orders entered by Judge Penn in October 1977, all nonresidents who were subject to the tax and paid it, whether or not they filed individual claims for refund, were bound to the judgment order that the tax was not enacted in violation of the Home Rule Act. That binding judgment continued for two and one-half years, until this Court's mandate reversing the judgment was returned to the Superior Court on May 29, 1980. It would be a denial of due process and fundamentally unfair to deprive any of these class members of the benefits of this Court's judgment holding the tax illegal.

Rule 23(c)(3) provides:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the Court finds to be members of the class.

As discussed earlier, the effect of the judgment entered here by Judge Penn in 1977, which described and included "those whom the court [found] to be members of the class," was to bind the class members to the judgment that the tax was lawful. Any subsequent individual suit would have been barred by the doctrine of *res judicata*. *Hansberry* v. *Lee, supra; Laskey* v. *International Union (UAW), supra; Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970). *See generally* 3B *Moore's Federal Practice* ¶ 23.60 (2d ed. 1982). During the two and one-half years Judge Penn's order that the tax was lawful was binding on the class, the three-year time period prescribed in D.C. Code § 47-1586j for filing individual claims for refund expired for taxes paid with respect to 1975 and 1976. To hold, as the District urges

and as Judge Fauntleroy held, that class members who failed to file claims for refund during a period when they were bound by a judgment upholding the tax should now be deprived of the benefits of the reversal of that judgment would be violative of due process.

Such a holding by this Court would be exceptionally unfair. First, because the District has had the benefit of the trial court's ruling for two and one-half years, the District not only was protected from other lawsuits, but, more importantly as a practical matter, was able to compel from the class the collection and the use of millions of dollars in tax revenues, at interest of only 4 percent. Second, no real prejudice to the District would result from granting the benefits of the reversal to all class members. The District has been on specific notice since the outset that the tax was claimed to be unlawful and that *all* taxes paid under the statute by nonresidents were sought to be refunded. And, of course, the District knew from whom and in what amounts it had collected the tax.

On the other hand, to bar recovery for class members who failed to file individual claims would be extremely harsh. The statutory period for filing individual claims *expired* for 1975 and 1976 *before* this Court's mandate holding the tax unlawful was effective. It surely is not unreasonable for some class members not to have filed individual refund claims during a time when they were bound to the trial court's judgment that the tax was lawful.

The District's argument, adopted by Judge Fauntleroy, that members of the class were notified in 1978 that they must file individual claims for refund (and thus were not prejudiced) misses the point. First, as noted, at the time of the 1978 notice the tax had been judicially declared a lawful enactment under the Home Rule Act. More importantly, it is undisputed that many class members, namely those who by reason of death or retirement or otherwise were no longer

operating an unincorporated business in the District, were not on the 1978 mailing list and thus *did not receive the 1978 notice.* Indeed, many class members who did not receive the 1978 mailing but did receive notice of the October 22, 1980, consent judgment responded by filing their claims, only to have them rejected as untimely for 1975 and 1976.

For all of these reasons, we submit that due process and fundamental fairness demand that class members not be denied the benefits of this Court's judgment holding the tax *ultra vires* and unlawful.

APPENDIX "D"

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

JUDGMENT ORDER

Pursuant to the opinion and judgment of the District of Columbia Court of Appeals, sitting *en banc*, entered February 12, 1980, and the mandate thereupon, returned to this Court May 29, 1980, judgment in favor of the petitioners is hereby entered this *22nd* day of October, 1980, and it is ordered as follows:

I

1. The class consists of those taxpayers described in the orders of this Court filed in these cases on October 18, 1977, and October 27, 1977, that is: (A) all nonresident professionals (except petitioner Richard A. Bishop) who may not incorporate by law, customs, or ethics except under D.C. Code §29-1101 *et seq.*, and who have paid the tax imposed by D.C. Code §47-1574b by reason of the amendment of D.C. Code §47-1574 by section 605 of D.C. Law 1-23; and (B) those non-residents who carry on a trade or business in the District of Columbia in which more than 80% of the gross income is derived from the personal services actually rendered by the individual or members of that trade or business in which

capital is not a material income-producing factor and who have paid such tax.

2. The District of Columbia is directed to refund the District of Columbia unincorporated business taxes paid by or on behalf of petitioner Axel-Felix Kleiboemer, all members of the class, and Richard A. Bishop, pursuant to D.C. Code §47-1574b, as provided in the succeeding paragraphs of this Order, together with interest as provided by law.

3. The District of Columbia is directed to make no refunds of such taxes to petitioner Kleiboemer and members of the class or to petitioner Bishop until this Court has ruled upon appropriate applications by counsel for attorneys' fee and expenses.

4. In making refunds of the unincorporated business tax to petitioner Kleiboemer and the class of taxpayers he represents and to petitioner Bishop, the District of Columbia shall first:

a. Deduct, except from the refund payable to petitioner Bishop, a proportionate amount of attorneys' fee and expenses as will be directed by this Court; and

b. Deduct for each taxable year the $25 annual *per capita* license fee which, if section 605 of D.C. Law 1-23 had not been enacted, would have been imposed by D.C. Code §47-1591 on persons who conduct a trade, business, or profession in the District of Columbia, including shareholders of professional corporations, but excluding salaried employees, provided such persons have gross income of $12,000 or more during the taxable year.

5. On April 1, 1981, or, if later, promptly after this Court has ruled on the application of petitioners' counsel for attorneys' fees and expenses, refunds shall be made, and attorneys' fees and expenses awarded shall be paid, except for:

a. amounts still in dispute because any of the issues set forth in Part II of this Order have not been finally determined, which amounts shall be refunded promptly by the

District in accordance with a further Order of this Court if any such issues are finally determined in favor of the class members, and

b. amounts which cannot be determined because of a taxpayer's failure to provide the information requested by the notice referred to in paragraph 8 of this Order, which amounts the District of Columbia is directed to refund as soon as possible after receipt by the District of the necessary information.

6. If a partnership or professional corporation which has paid the tax is or was at any time after 1974 composed of resident as well as nonresident members, or if an individual who has paid the tax is or was at any time after 1974 a resident, the District is hereby directed to make refunds for each year only of the amount of tax paid with respect to nonresident members' shares of the income of the partnership or professional corporation, or with respect to the individual's income earned while a nonresident, recognizing that this order does not relate to refunds of tax paid with respect to resident members' shares of partnership or professional corporation income, or to the income of an individual earned while a resident.

7. For purposes of determining the award of attorneys' fees, the District of Columbia is hereby directed to assemble and to provide in writing to this Court and to taxpayers' counsel, prior to December 5, 1980, a close approximation of the total tax collected from nonresident class members.

8. The District of Columbia is directed prior to October 25, 1980, to notify at its expense all taxpayers who have paid the tax imposed by D.C. Code §47-1574b by reason of the amendment of C.C. Code §47-1574 by section 605 of D.C. Law 1-23, whether or not they have filed a claim for refund, (1) of their possible right to receive a refund of the tax paid by them in accordance with this Order; and (2) of the petition for attorneys' fees and expenses which is to be filed, the procedure for filing comments or objections thereto, and the date

and time of hearing thereon. The notice shall be mailed to said taxpayers at the addresses shown on their most recently filed unincorporated business tax returns and shall be in substantially the form attached hereto as Exhibit 1. Notices mailed to taxpaying partnerships and professional corporations will constitute notice to the partners and professional corporation shareholders. The counsel for petitioners are directed to publish the foregoing notice in substantially the form attached hereto as Exhibit 1 in two newspapers of general circulation in the District of Columbia on one occasion as soon as practicable but no later than November 28, 1980. The District of Columbia is directed to pay the cost of such publication, which cost shall be deducted from the refund of taxes and accumulated interest.

II

The following disputed issues are to be decided by this Court prior to the payment of any refunds of tax or interest attributable to the resolution of said issues:

1. Whether a taxpayer who has failed to file a claim for refund under D.C. Code §47-1586j within three years from the time the tax was paid is entitled to receive a refund of the tax paid or, alternatively, whether the filing herein by the petitioner Axel-Felix Kleiboemer of his individual claim for refund, his claim for refund filed for the class, and his class action petition constituted the timely filing of a claim or the timely filing of a petition by the members of the class.

2. Whether a taxpayer is entitled to receive a refund of tax paid for a year or years for which the statute of limitations has *not* run if he fails to file a claim for refund under D.C. Code §47-1586j.

3. When interest as provided by law begins to run.

4. Any other issues that may be presented to the Court for resolution.

III

Petitioners shall file their initial pleading setting forth their contentions and supporting authorities with respect to the issues set out in Part II of this Order by November 7, 1980.

The District of Columbia shall file its contentions and authorities in opposition thereto by November 28, 1980.

Petitioners shall file their application for attorneys' fees and expenses by November 28, 1980. A hearing shall be held on the application for attorneys' fees and expenses at 9:30 a.m., December 22, 1980, in Courtroom 42, 500 Indiana Avenue, N.W., Washington, D.C. 20001.

/s/ John D. Fauntleroy
Judge

Consented to by:

/s/ Philip L. Kellogg
Esquire

/s/ James L. Lyons
Esquire

/s/ John M. Bixler
Esquire

/s/ Ronald D. Aucutt
Esquire

Attorneys for Petitioner Bishop

/s/ Bradley G. McDonald
Esquire

Attorneys for Petitioner Kleiboemer and the Class

Consented to, except for the amount of attorneys' fees to be awarded by the Court, with which the District of Columbia will neither agree nor disagree.

/s/ Judith W. Rogers
Corporation Counsel, D.C.

/s/ James E. Lemert
Deputy Corporation Counsel, D.C.

/s/ Richard L. Aguglia
Assistant Corporation Counsel, D.C.

Attorneys for Respondent District of Columbia

Office - Supreme Court, U.S
FILED
FEB 3 1984
ALEXANDER L. STEVAS
CLERK

No. 83-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AXEL-FELIX KLEIBOEMER, *et al.*,
Petitioners,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF FOR PETITIONERS

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THE DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

REPLY BRIEF FOR PETITIONERS

I.

Respondent, District of Columbia, does not challenge the intellectual validity of petitioners' argument that it is a denial of due process of law to refuse to refund $1.8 million dollars of unlawfully collected taxes to 2,711 nonresident class members who have obtained a favorable class action judgment.[1] Rather, respondent seeks to

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[1] The District of Columbia Court of Appeals concluded in the first round of appeals that class members do have a statutory vested right, granted by Congress under the Home Rule Act, to be immune from a commuter tax and that this right was abridged by the tax in question. *Bishop* v. *District of Columbia*, 401 A.2d 955 (D.C. App. 1979), 411 A.2d 997 (*en banc*), *cert. denied*, 446 U.S. 966 (1980). Thus, the existence of such a vested right is not in dispute here.

avoid the substance of petitioners' due process claims by incorrectly arguing that the issues are not properly before this Court.

The District errs in asserting that the due process claims were not raised below. Petitioners raised the due process arguments during the course of the trial court's hearing held on the question of whether the District was required to refund all of the tax money. Class counsel (Mr. McDonald) stated:

> We submit then, Your Honor, that at that point, where the District had a ruling, that the tax was [lawful], they clearly—it was to their advantage to accept the class as certified by Judge Penn because when it was ruled [lawful], they wanted to bind everybody. Thereafter, when we appealed, and the District did not appeal, if they wanted to challenge the certification or the nature and extent of the certification, they should have filed notice of appeal. They cannot now come back three years, over—three years later and seek to relitigate that issue, which should have been raised at the time of Judge Penn's class certification. *I submit to you that the very fundamental law governing class action judgments is that they are binding on all parties, regardless of the outcome.* That is the very purpose. It is binding for, against the Plaintiffs. It is binding for the Plaintiffs. It is binding for the District and binding against the District. It would, indeed, be a novel proposition of law if the District were to successfully urge now that, after having been certified, having been bound by the judgment, and entitled to the benefits, that by some arguable theory, they can now redefine the class, so as to eliminate certain people from the class who are originally certified in the class.

Transcript of Hearing of December 18, 1980 at 18-19. (Emphasis supplied.)

Petitioners also clearly raised and briefed the constitutional arguments in the court of appeals. Argument II of Appellants' Brief states that:

> Due process and fundamental fairness demand that all class members, having been bound by the judgment against them, have the benefit of this Court's reversal of that judgment and decision that the tax is unlawful.

Appellants' Brief at 26-28. Respondent never suggested that the due process and fundamental fairness issues were not properly before the court of appeals. Appellee's Brief at 21-23.

The Petition for Rehearing or Rehearing En Banc also clearly raised the constitutional claims. Petitioners argued:

> [I]t would be a denial of constitutional due process of law for the District of Columbia to deny refunds to members of a properly certified class (including all nonresidents who have paid the tax whether or not they have filed individual claims for refund) where such class members ultimately obtain an en banc judgment of this Court that the tax challenged in the class action is in fact unlawful and where all class members did not receive actual individual notice of the requirement for administrative claims. . . . The District cannot constitutionally refuse to refund all such monies or refuse to pay interest as provided by law when this Court ultimately reversed the trial court's judgment against the members of the class as originally defined in the class certification order.

Petition for Rehearing at 4-5.

The court of appeals quite plainly rejected petitioners' claims on the merits and held that allowing respondent to retain $1.8 million of the illegally collected taxes would

not be extremely harsh or fundamentally unfair. Pet. App. at 20a.[2]

Due process claims may properly be raised here when the claims were brought to the attention of the court of appeals "with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928), cited in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85, n.9 (1980). In *Zimmerman* this Court concluded that it had jurisdiction over all three issues where petitioner alleged in general terms that the state statute was unconstitutional. *Id.* 278 U.S. at 65, 69. *Zimmerman* makes clear that "[n]o particular form of words or phrases is essential" to raise a constitutional claim and that the "fair precision" requirement is a standard which is easily met.

This Court has "never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of . . . a federal claim be raised and decided below." *Illinois* v. *Gates*, 462 U.S. ——, 103 S. Ct. 2317, 2337 (1983) (White, J., concurring). *See* R. Stern and E. Gressman, *Supreme Court Practice*, 230 (1978). "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question

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[2] For the purposes of this Court's review, it is not necessary to inquire if a federal question was raised in a court below where it appears that such question was actually considered and decided. *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 n.13 (1971). A ruling on the merits of a federal question by the highest state court leaves the federal question open to review in this Court. *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980); *Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979); *Harlin* v. *Missouri*, 439 U.S. 459 (1977); *Franks* v. *Delaware*, 438 U.S. 154, 161-162 (1978); *Rogers* v. *Hennepin County*, 240 U.S. 184, 188-189 (1916).

there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899). The jurisdiction of this Court "does not depend on citation to book and verse." *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-114 n.9 (1982); *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 255-258 (1957). Thus, under well-settled principles of law, this Court has jurisdiction to review any constitutional claims raising due process or fundamental fairness issues where the court of appeals clearly decided petitioners' due process and fundamental fairness claims.[3]

II.

A.

Respondents incorrectly rely on case law which requires exhaustion of administrative remedies[4] (Brief in Op. at 8-9, n. 7). This case law is inapplicable to petitioners' constitutional arguments where, as here, a class is properly certified and where the class has obtained a judgment holding the tax *ultra vires* and unlawful. (Pet. at 9-15). *See Staub* v. *City of Baxley*, 355 U.S. 313, 319 (1958) (failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of conviction under such ordinance.)

Moreover, respondent's authorities are distinguishable on their facts. *Dodge* v. *Osborn*, 240 U.S. 118, 122 (1916), holds that a U.S. District Court has no jurisdiction to enjoin the collection of the income tax where the taxpayer never paid the tax or filed an appeal to the Commissioner of Internal Revenue. *Bob Jones Univer-*

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[3] This Court also has jurisdiction under the "plain error" rule. *E.g.*, *Wood* v. *Georgia*, 450 U.S. 261, 265 n.5 (1981).

[4] Respondent's authority is inapposite where, as here, the tax has been declared illegal and where the class representative did exhaust administrative remedies prior to filing the class action and did so again during the litigation by filing a class claim for refund. (Pet. App. 31a-32a.)

sity v. *Simon*, 416 U.S. 725, 748-750 (1974), holds that the Anti-Injunction Act, 26 U.S.C. § 7421(a), forbids the issuance of injunctive relief to bar the Internal Revenue Service from withdrawing petitioner's tax-exempt status. *California* v. *Grace Brethren Church*, 457 U.S. 393, 407-413 (1982), holds that the Tax Injunction Act, 28 U.S.C. § 1341, deprives the U.S. District Court of jurisdiction over a suit seeking to enjoin the State of California from collecting unemployment tax from certain schools. *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981), holds that principles of federalism and comity bar a taxpayer from maintaining an action in U.S. District Court for damages under 42 U.S.C. § 1983 to redress an allegedly unconstitutional administration of a state tax system.

B.

The District concedes that many class members did not receive actual notice that the District would seek to require taxpayers to file individual claims for refunds, even though a class action had been certified. Where, as here, the names and addresses were "reasonably ascertainable," due process requires actual notice.[6] *Mennonite Board of Missions* v. *Adams*, 462 U.S. ——, 103 S. Ct. 2706, 2712 (1983); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

III.

A fair reading of the opinion below demonstrates that the court of appeals rested its decision as regards equitable tolling on federal law. With one exception, the cases cited by the court of appeals are decisions of this Court.

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[6] Respondent had in its files the names and addresses of those individuals who did not receive the December 1978 mailing, since each of these individuals had filed a return for tax year 1975 and/or 1976, even if these names and addresses were not formally collected in a "list."

The fact that the court of appeals, without resting its decision on the local law, finds it necessary to distinguish cases decided by this Court reveals the federal basis of the court's decision so as to confer jurisdiction on this Court.[6] *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975). *See also Oregon* v. *Kennedy*, 456 U.S. 667, 671 (1982). This Court has recognized the undesirability of having conflicting state and federal interpretations of federal law. *Communist Party, U.S.A.* v. *Catherwood*, 367 U.S. 389, 394 (1961). Because the court of appeals felt compelled by this Court's decision to decide the equitable tolling doctrine the way it did, this Court should grant the writ.[7] *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

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[6] Superior Court Rule 23 is identical to Rule 23 of the Federal Rules of Civil Procedure. Federal cases are authority where D.C. rules are identical to federal rules. *Alfred A. Altimont, Inc.* v. *Chatelain, Samperton & Nolan*, 374 A.2d 284, 288 n.4 (D.C. App. 1977).

[7] *Chardon* v. *Soto*, 462 U.S. ——, 103 S. Ct. 2611, 2614-2615 (1983), is distinguishable on its face because the issue of tolling of statute of limitations was decided as a matter of Puerto Rican, not federal, law.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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